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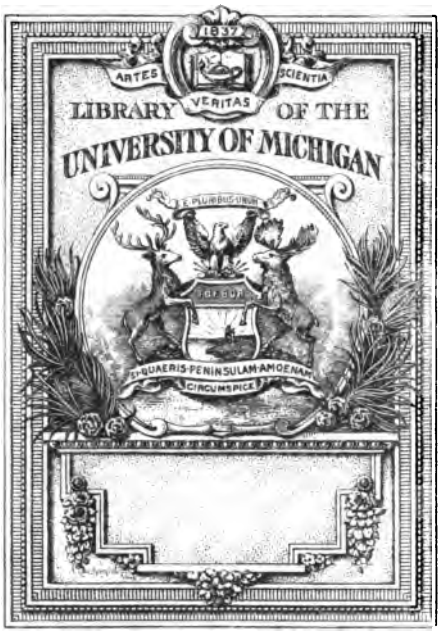
CASES ON RESTRAINT OF TRADE III

WYMAN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CASES ON RESTRAINT OF TRADE
III

A SELECTION OF CASES FROM

CASES ON PARTNERSHIP

BY

JAMES BARR AMES
Bussey Professor of Law in Harvard University

AND FROM

CASES ON PRIVATE CORPORATIONS

BY

JEREMIAH SMITH
Story Professor of Law in Harvard University

ARRANGED BY

BRUCE WYMAN

CAMBRIDGE
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CHAPTER III. — ASSOCIATION.

SECTION I. — THE NATURE OF THE ASSOCIATION.

A. The Conception of the Association.

(1) *Degrees of Association.*

130598

SOLOMON BLUE, PLAINTIFF IN ERROR, v. WILLIAM LEATHERS, DEFENDANT IN ERROR.

IN THE SUPREME COURT, ILLINOIS, NOVEMBER TERM, 1853

[*Reported in* 15 *Illinois Reports*, 31.]

CASE heard before Marshall, J.

R. S. Nelson, for plaintiff in error.

R. F. Wingate, for defendant in error.

SCATES, J. By consent, the parties employed a third person to state their accounts and strike a balance between them; both parties rendered their accounts accordingly, and the balance was ascertained and announced to the parties, without exception to it by either, or any express promise to pay by Blue, against whom a balance of $87.97 was found. Before separating, they agreed that a small item of some four or five dollars had been overlooked, and Leathers agreed to adjust it when the balance was paid.

This settlement was proven upon the trial, and, at the instance of Leathers, the court instructed the jury that an action would lie upon it, without an express promise to pay the amount found by it. To this instruction objection is made here, on the ground that the evidence established a partnership between the parties in the matters of account taken into that settlement, and therefore an express promise to pay the balance was necessary to sustain an action at law. This court has so

2 Vt. 65; Ambler *v.* Bradley, 6 Vt. 119; Kellogg *v.* Griswold, 12 Vt. 291; Mason *v.* Potter, 26 Vt. 722; Hawkins *v.* McIntyre, 45 Vt. 496; Wilkinson *v.* Jett, 7 Leigh, 115; Ford *v.* Smith, 27 Wis. 261.

It is now also almost universally agreed that such person is not liable as a partner to third persons. Shaw *v.* Galt, 16 Ir. C. L. 357; Berthold *v.* Goldsmith, 24 How. 536; *Re* Francis, 2 Sawy. 286; Marsh *v.* N. W. Ins. Co., 3 Biss. 351; Hodges *v.* Dawes, 6 Ala. 215; Loomis *v.* Marshall, 12 Conn. 69; Parker *v.* Fergus, 43 Ill. 437; Burton *v.* Goodspeed, 69 Ill. 237; Macy *v.* Combs, 15 Ind. 469 (*semble*); Hallet *v.* Desban, 14 La. An. 529; Chaffraix *v.* Lafitte, 30 La. An. 631; Turner *v.* Bissell, 14 Pick. 192; Denny *v.* Cabot, 6 Met. 82; Bradley *v.* White, 10 Met. 303 (see also Brigham *v.* Clark, 100 Mass. 430; Meserve *v.* Andrews, 104 Mass. 360); Hall *v.* Edson, 40 Mich. 651; Voorhees *v.* Jones, 5 Dutch. 270 (*semble*); Burckle *v.* Eckart, 1 Den. 337: 3 Comst. 132, s. c.; Fitch *v.* Hall, 25 Barb. 13; Hotchkiss *v.* English, 4 Hun, 369; Miller *v.* Bartlet, 15 S. & R. 137; Dunham *v.* Rogers, 1 Barr, 255; Edwards *v.* Tracy, 62 Pa. 374; Polk *v.* Buchanan, 5 Sneed, 721 (*semble*); Goode *v.* McCartney, 16 Tex. 193; Bowman *v.* Bailey, 10 Vt. 170 (*semble*).

But see *Ex parte* Digby, 1 Deac. 341 (*semble*); Miller *v.* Hughes, 1 A. K. Marsh. 181; Taylor *v.* Terme, 3 Har. & J. 505; Rowland *v.* Long, 45 Md. 439 (*semble*); Purviance *v.* McClintee, 6 S. & R. 259; Ditsche *v.* Becker, 6 Phila. 176 (*semble*), *contra*. and conf. Strader *v.* White, 2 Neb. 348. — ED.

decided in Chadsey *v.* Harrison [1] and in Davenport *v.* Gear *et al.*,[2] and also in New York. Casey *v.* Brush;[3] Westerlo *v.* Evertson.[4] An express promise is necessary to sustain an action at law for such a partnership balance. But this rule has no application to this case; the question as to the existence of a partnership was submitted to the jury among others, and from a general verdict for plaintiff we may infer that they found for the plaintiff on this ground also, unless misled by the instruction of the court, as applicable to partnerships. But even in this point of view it would be erroneous only as an abstract proposition, for the testimony very clearly shows there was no partnership. There was a joint interest only. Blue agreed to furnish his farm and a certain amount of teams and labor. Leathers was to labor and manage the tillage, and the parties were to divide the crop in the proportion of two-thirds to Blue and one-third to Leathers. This does not constitute a partnership, although it is a joint enterprise.

Here is no trading, no risks, no contingent profits, but simply an agreement for joint tillage, and a division of the produce of the farm in kind.[5]

Judgment affirmed, with costs. *Judgment affirmed.*[6]

[1] 11 Ill. 156. [2] 2 Scam. 498.
[3] 2 Caines, 295. [4] 1 Wend. 533.

[5] A portion of the case not relating to the question of the existence of a partnership is omitted. — Ed.

[6] Holloway *v.* Brinkley, 42 Ga. 226; Smith *v.* Summerlin, 48 Ga. 425; Donnell *v.* Harshe, 67 Mo. 170; Putnam *v.* Wise, 1 Hill, 234; Murray *v.* Stevens, Rich. Eq. Cas. 205, *accord.*

Allen *v.* Davis, 13 Ark. 28 (*semble*); Holifield *v.* White, 52 Ga. 567; Adams *v.* Carter, 53 Ga. 160, *contra.*

Conf. Tibbatts *v.* Tibbatts, 6 McL. 80.

Similarly, an agreement between two or more persons, by which labor or materials, or both, are to be contributed by each to the acquisition or production of certain goods, and the goods are then to be divided between them, does not create a partnership. Hurley *v.* Walton, 63 Ill. 260; Stoallings *v.* Baker, 15 Mo. 481; Gilman *v.* Cunningham, 42 Me. 98. But see Musier *v.* Trumpbour, 5 Wend. 274 (*semble*), *contra;* and conf. Everitt *v.* Chapman, 6 Conn. 347; 12 Conn. 85–87; Bucknam *v.* Barnum, 15 Conn. 73; Ensign *v.* Wands, 1 Johns. Cas. 171; Farmer's Co. *v.* Ross, 29 Ohio St. 429; Jones *v.* McMichael, 12 Rich. 176. — Ed.

CHAMPION AND OTHERS *v.* BOSTWICK AND WIFE.

IN THE COURT FOR THE CORRECTION OF ERRORS, NEW YORK, DECEMBER, 1837.

[*Reported in* 18 *Wendell*, 175.]

ERROR from the Supreme Court. Bostwick and wife brought an action on the case against Champion and others, for an injury sustained by the wife in being thrown from a wagon in which she was riding, in consequence of a stage-coach coming in collision with the wagon, through the negligence of the driver of the coach. The defendants run a line of stage-coaches from Utica to Rochester; the route was divided into sections; a section extending from Utica to Vernon was occupied by Dodge, one of the defendants; another section, extending west, was occupied by Ewers and others; and the remainder of the route by Champion and Bissell. The business was conducted and the proceeds of the concern divided as follows: The occupants of each section provided their own carriages and horses, employed their own drivers, and paid the expenses of their separate sections of the route, except the tolls at turnpike-gates; and the moneys received as the fare of passengers, after deducting such tolls, were divided among the occupants of the several sections, in proportion to the number of miles of the route run by each. The injury complained of happened on the section of the route occupied by Dodge, the stage-coach which was driven against the wagon was owned by him, and the driver of it employed by him. The judge charged the jury that, upon the above facts, the defendants must be considered partners, and that they were all responsible for any injury occasioned by the negligence of either of the drivers of the stage-coaches on either section of the route, as each driver was the servant of all the individuals connected in the business; that the fact that the occupants of each section employed their own drivers and paid the expenses of their own section did not discharge them from liability; that a right to a division of the fare received from passengers, after paying the tolls, in proportion to the distance run by the occupants of the respective sections, was an interest in the profits, constituting them partners, and rendering them liable in this action.[1] The plaintiffs recovered a verdict, and the defendants moved for a new trial, which was refused by the court, and judgment rendered for the plaintiffs. See case, argument of counsel, and opinion of court, 11 Wendell, 571 *et seq.* The defendants sued out a writ of error.

[1] The statement of facts is taken from the report of the case in 11 Wend. 571. — ED

The case was argued here by

B. F. Butler (Attorney-General of the United States) and *Roger M. Sherman* (of Connecticut), for plaintiffs in error.[1]

After advisement, the following opinion was delivered

By the CHANCELLOR. The plaintiffs below have been permitted to recover for an injury sustained by the wife in being run over by the driver of a coach and horses, forming part of a continuous line of stages between Utica and Rochester. The injury took place on a part of the route between Utica and Vernon; and was done by a coach and horses belonging to Dodge, or which had been hired to him by the year, and by a driver in his immediate employ. And the only question for the consideration of this court is, whether the arrangement between the owners of the different parts of the line between Utica and Rochester was such as to render Champion and Ewers liable to third persons for such an injury, as partners of Dodge in this part of the line. From the nature of the arrangement between the different stage-owners, it is very evident that, as between themselves, Dodge alone ought to sustain the loss; and that, if the recovery had been against him solely, he would not have been entitled to call upon the stage-owners upon other parts of the line for contribution; and in case this recovery against the others is sustained, he would be bound to make good their loss if he were not insolvent. As between these different stage-owners, Stevens, the driver, was clearly the servant of Dodge only. Dodge, therefore, is ultimately liable to them for any injury which they may sustain by the carelessness of his servant while in his employ; to the same extent as if such injury had been occasioned by his own carelessness while driving the coach and horses himself.

I think, however, that the arrangement made between the stage-owners, as to the division of the passage-money received upon any part of the line, was such as to render them all liable to third persons, as copartners, for such an injury as this; or for any injury to the passengers on any part of the route; and also rendered them liable for any contract made by either of such owners which was directly connected with the receipt of the passage-money, or the increase of the profits on any part of the entire route. By the agreement between them, the passage-money received by either for the transportation of passengers over any part of the line constituted a common fund, out of which the tolls on the whole route were first to be paid, and the residue was then to be divided among the owners of the different parts of the line in proportion to the distances run by each, whether such passage-money was received for the transportation of passengers over one part of the line or another. This division of the whole passage-money, after paying out of the same the expenses of the tolls, was a division of the prof-

[1] The arguments of counsel are omitted. — ED.

its of a joint concern, so as to constitute a partnership between themselves as to that fund; to entitle either of them to an account; and to render them liable to third persons as partners as to everything in which the different owners of that fund had a joint or common interest. If Dodge had received the passage-money for the transportation of a passenger over his part of the route only, he would have received it for the benefit of the whole concern, as they all had a common interest in the profits of that part of the line. All, therefore, would have been liable to such passenger, as partners in this part of the route, for any damage he might sustain in consequence of a refusal of Dodge to transport him from Utica to Vernon; or for any injury which might happen to him by the carelessness of Dodge or his driver, or by reason of any defect in the coach or harness or the team. The case would be entirely different if each stage-owner was to receive and retain the passage-money earned on his part of the line, and to sustain all the expenses thereof; and was only to act as agent of the others in receiving the passage-money for them for the transportation of passengers over their parts of the line. In that case, there would be no joint interest, and no liability to third persons as partners.[1]

The case of Wetmore and Cheesebrough *v.* Baker and Swan,[2] does not decide that there was no partnership in that case. As to a part of the transaction there was a partnership, not between the five persons, but between the two firms of W. & C. and B. & S., and Ostrom. Ostrom was to run one part of the route, W. & C. another part, and B. & S. ran the residue of the route. But the expense of extra carriages was to be borne by all of the parties jointly. To this extent there was a copartnership between the three owners of different parts of the route; and all would clearly have been liable to third persons for the line of extra carriages, if any had been necessary. But there was a settlement and an account stated between the three parties to this arrangement, one of the partners in each of the firms of W. & C. and B. & S. being present and agreeing to such liquidation of the accounts. In conformity with which settlement, the money then in Albany was to be paid to B. & S.; but it was afterwards received by the firm of W. & C., who were sued by B. & S. for money had and received to their use. The only question, therefore, was, whether the settlement and adjustment of the joint concern by Cheesebrough, the partner of Wetmore in their part of the route, was binding upon such partner. In other words, whether the running of the stages on the whole line was a

[1] Ellsworth *v.* Tartt, 26 Ala. 733; Irvin *v.* N. C. & St. L. Co., 92 Ill. 103; Darling *v.* Boston Co., 11 All. 295; Gass *v.* N. Y. Co., 99 Mass. 220; Hartan *v.* Eastern R. R., 114 Mass. 44; Wetmore *v.* Baker, 9 Johns. 307; Merrick *v.* Gordon, 20 N. Y. 93, *accord.* — Ed.

[2] 9 Johns. 307.

joint concern between the five individuals as copartners, or a joint concern between Ostrom and the two firms of W. & C. and B. & S. And the court very correctly decided that there was no partnership existing between the five individuals which could interfere with a recovery in that suit.

It is not necessary to constitute a partnership that there should be any property constituting the capital stock which shall be jointly owned by the partners. But the capital may consist in the mere use of property owned by the individual partners separately. It is sufficient to constitute a partnership if the parties agree to have a joint interest in and to share the profits and losses arising from the use of property or skill, either separately or combined. Here the capital which each contributed or agreed to contribute to the joint concern was the horses, carriages, harness, drivers, &c., which were necessary to run his part of the route; and to be fed, repaired, and paid at his own expense. The only debts or expenses for which they were to be jointly liable as between themselves were the tolls upon the whole line; and the joint profits which they were to divide, if any remained after paying the tolls, was the whole passage-money received upon the entire line. Although it may be fairly inferred that each party supposed that the expenses of running his part of the line, exclusive of the tolls, would be equal to the distance run by him, it by no means follows that any of them supposed that the actual passage-money or profits of the different parts of the line would be in the same proportion; as it is a well-known fact that the number of passengers who travel in public conveyances increase as you approach large market towns, or other places of general resort. The only object of the agreement to divide the passage-money earned upon the whole line among the different proprietors must have been to give to those who run that part of the line where there was the least travel a portion of the passage-money on other parts of the route, as a fair equivalent for their equal contribution of labor and expense for the joint benefit of all. And as all the owners of the line were thus interested in every part of the route, and were liable to the passengers if they were unreasonably detained on the way, I am inclined to think that if the driver of either had refused to carry on the passengers over his part of the line without any sufficient excuse, either of the other parties who happened to be present might have employed another driver, at the common expense, to proceed with the team to the end of that route, although as between themselves the owner of that part of the line would be bound to pay such extra expense. And the same right would have existed if the driver, by reason of intoxication or otherwise, was incapable of discharging his duty with safety to the passengers. Although the title to the coach and horses for the time being might not be so far vested in the partners as to au-

thorize any of them to take them out of the possession of the general owner himself under similar circumstances, the passengers might unquestionably be sent on by either of the others, at his expense; or at the expense of all the owners of the line who were interested in having it done, if he was unable to pay the expense.

There is a class of cases in which it has been held that a person who merely receives a compensation for his labor in proportion to the gross profits of the business in which he is employed, is not a partner with his employer, even as to third persons. The distinction appears to be between the stipulation for a compensation proportioned to the profits, and a stipulation for an interest in such profits so as to entitle him to an account as a partner. 1 Rose, 91. A distinction which Lord Eldon says is so thin, that he cannot state it as settled upon due consideration. But he says it is clearly settled as to third persons, though he regrets it, "that if a man stipulates that as the reward of his labor he shall have, not a specific interest in the business, but a given sum of money, even in proportion to the quantum of profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner; and no arrangement between the parties themselves can prevent it." *Ex parte* Hamper.[1] Carey, however, defends the principle upon which this distinction is based. He insists that as the person who is to receive a compensation for his labor in proportion to the profits of the business, without having a specific lien upon such profits to the exclusion of other creditors, it is for their interest that he should be compensated in that way, instead of receiving a fixed compensation whether the business produced profits or otherwise; on the other hand, that if he stipulates for an interest in the profits of the business which would entitle him to an account, and give him a specific lien or a preference in payment over other creditors, and giving him the full benefit of the increased profits of the business without any corresponding risk in case of loss, it would operate unjustly as to other creditors; and, therefore, that it is perfectly right in principle that he should be holden to be liable to third parties as a partner in the latter case, but not in the first.[2] I am inclined to think this distinction is a sound one as regards the rights of third persons. But as between the parties themselves, it is perfectly competent for them to agree that one shall have his full share of the anticipated profits as a compensation for his labor or skill, without running any risk of absolute loss, except as to third persons, if, instead of producing profits, the business should prove a losing concern. Many of the cases cited by the counsel for the plaintiffs in error were those in which the question arose between the immediate parties to the agreement which was

[1] Stark's Law of Part. 137. [2] Carey on Part. 11, note *i*.

supposed to make them partners as between themselves; and they may therefore be reconciled with other cases in which they were held to be liable as partners to third persons upon the principles before stated.

That one partner is liable in tort for the acts of his copartner in the prosecution of the copartnership business, as well as upon contracts for the benefit of the joint concern, appears to be well settled. And the case of Wayland *v.* Elkins [1] is in point to show that each is liable in tort for the negligence of the servant employed and paid by one of them exclusively, by which a third person is injured by such servant while engaged in the business from which both were to derive a profit. If one partner would be liable for the negligence of his copartner in such a case, it seems to be a necessary consequence that he should be liable for the same act if done by the servant of such copartner. In relation to the case of Barton *v.* Harrison,[2] in which it was held that a party jointly interested in a stage-coach which was horsed by the proprietors separately on different parts of the line, was not answerable for corn purchased by one of the proprietors for the use of his own horses on his part of the line, Gibbs, C. J., says, when the case was cited by the counsel for the defendant in Wayland *v.* Elkins, "I recollect the case very well, but the decision there turned upon the inferior contract, if I may so term it, between the parties. In that case, there was a particular contract between the parties, and it was known in what situation they stood in respect to each other." In other words, it was known in that case as in this, that the different proprietors were to run their several parts of the line with their own teams and at their own expense; and the plaintiff had furnished one of the proprietors with grain for his horses, knowing that it was for his sole benefit; and as it was furnished on his credit solely, the plaintiff had no just grounds for charging the partnership therewith. It was, in fact, trusting the individual with a part of the capital which he knew that individual had agreed to contribute to the partnership, and which the other partners are never liable for under such circumstances.

For these reasons, I think there was such a partnership between the plaintiffs in error in relation to the business in which Stevens, the driver, was engaged at the time this injury was done, as to render them all liable to the defendants in error for the consequences of his negligence; and that the judgment of the Supreme Court should be affirmed.

On the question being put, Shall this judgment be reversed? all the members of the court (twenty-four being present), with but two dissenting voices, voted in the negative. Whereupon the judgment of the Supreme Court was affirmed.[3]

[1] 1 Starkie, 272; s. c. Holt's N. P. 227.

[2] 2 Taunt. 49.

[3] Wayland *v.* Elkins, 1 Stark. 272, *accord.*
Conf. Pattison *v.* Blanchard, 1 Seld. 186. — Ed.

BURCKLE v. ECKART, IMPLEADED WITH GIBB AND OTHERS.

IN THE SUPREME COURT, NEW YORK, JULY, 1845.

[*Reported in* 1 *Denio*, 337.]

ASSUMPSIT, tried before Kent, C. J., at the New York circuit, in January, 1843. The action was on a written agreement made on the second day of March, 1841, between the plaintiff, of Oswego, of the one part, and Messrs. James Gibb & Co., of Quebec, of the other part. By the contract, the plaintiff agreed to purchase wheat in Ohio during the year 1841, at as low a price as possible, to the extent of 200,000 bushels, and ship the same to Oswego. The expenses incurred were to be added to the cost of the wheat, and certain premiums were to be deducted. The plaintiff agreed to furnish a barrel of flour of a certain quality for every five bushels of sixty pounds of wheat, and to deliver the same at Kingston, U. C., to the agents of Gibb & Co. On such delivery, Gibb & Co. agreed to pay the plaintiff for each barrel of flour the amount of the cost of five bushels of wheat, including freight. Gibb & Co. were then to sell the flour in Canada, charging only actual expenses. The net profits arising from the sale of the flour were to be divided between the plaintiff and Gibb & Co. in the proportion of one-third to the former, and two-thirds to the latter.

James Gibb & Co. were partners in business at Quebec, L. C., and the firm was composed of James Gibb, Thomas Gibb, and Elisha Lane. They were made defendants with Eckart. Whether they had been served with process or not, was not stated; but Eckart alone defended; and one question was, whether he could be made liable with Gibb & Co. upon the contract.[1]

The plaintiff purchased wheat, manufactured and sent 11,485 barrels of flour to the agents of Gibb & Co., at Kingston, which was received and paid for by Gibb & Co., in pursuance of the agreement. The plaintiff also sent 1,350 barrels more, which Gibb & Co. refused to receive; and on the 16th of October, 1841, Gibb & Co. wrote the plaintiff that they would proceed no further under the contract. For this alleged breach the action was brought; and the plaintiff claimed to recover such profits as he would have made had there been a complete performance of the agreement. The defendant insisted that the contract was first broken by the plaintiff, and that Eckart was not a partner of Gibb & Co. The judge charged the jury, the defendant excepted; and the jury, without retiring, rendered a verdict for the plaintiff for

[1] The other facts of the case are omitted, being substantially reproduced in the opinion of the court. — EDS.

$17,170.60. The defendant Eckart moves for a new trial on the bill of exceptions.

M. S. Brewster and *G. Wood*, for the defendant, cited 2 Caines, 298; 17 Johns. 80; 1 Wend. 532; 5 id. 274; 24 id. 158; 19 id. 424, 428; 13 East, 7; 5 Taunt. 74; Story on Partn. 60, 62, 56, 7; Gow, 19, 21; id. 100.

F. B. Cutting and *S. Stevens*, for the plaintiff, cited 18 Wend. 184; Story on Partn. 49, 69, 51, 54, 23, 58; Coll. on Partn. c. 1, § 2; 3 Kent, 24–27; 16 Johns. 34; 1 Hill, 526; 6 Serg. & Rawle, 261; 6 Pick. 374; 16 id. 425; 2 H. Bl. 235, 246; 3 Maule & Selw. 357; 4 Barn. & Ald. 663; 18 Vesey, 300; 24 Wend. 158; 19 id. 424, 428, 30.

By the court, BRONSON, C. J. The contract on which the plaintiff sues is in writing. Eckart has not signed, and is not bound by it, unless he was a member of the house of James Gibb & Co.[1]

The testimony of Duncan McPherson shows precisely what was the real relation between Eckart and the house of Gibb & Co.; and as his testimony is entirely consistent with all the other evidence in the case touching that subject, we need not look beyond what he has said. Now, according to his evidence, Eckart was not a member of the house of Gibb & Co. But as the house required assistance in the out-door part of their business, they employed Eckart to attend to the purchasing and forwarding of Western produce; and, as a remuneration for his trouble, he was to receive one-fourth part of the profits coming to Gibb & Co. from that branch of their business. He acted in all matters connected with the business under the orders of Gibb & Co. He exercised no ownership over the property purchased, and was never looked upon or considered as a partner. It is quite clear that there was no partnership as between the parties to this arrangement; and I think there was none in relation to third persons. There was no community of interest in the capital stock; and Eckart did not act as a principal trader, but only as the agent or servant of Gibb & Co. He was not clothed with the usual powers, rights, or duties of a partner, but was subject to the orders of his employers. He had nothing to do with losses, except as they affected the profits out of which he was to be paid; and he was only to take a share of the profits in the lieu of wages, or as a mode of getting compensation for his services. I shall not go over the cases where this question has been considered, nor examine the nice distinctions which may be found in the books; for, so far as this court is concerned, it has been settled that a mere agent or servant, who is to obey orders, and has no interest in the capital stock, will not be a partner, even as to third persons, merely because he is to be compensated for his services by receiving a share of the profits which may arise from the business in which he is employed. Vander-

[1] A portion of the opinion relating to the nature of certain evidence is omitted. — ED.

burgh v. Hull.[1] It is undoubtedly true, as a general rule, that a communion of profits will make men partners, and draw after it a liability for losses. But it is abundantly settled that the rule is not universal: and the exception which will best reconcile the cases, is least liable to abuse, and is so distinctly marked that it can be easily administered, is that which allows one man to employ another as a subordinate in his business, and agree to pay him out of profits, if any shall arise, without giving the party employed the rights or subjecting him to the liabilities of a partner.

There was no conflict of testimony. It is true that Eckart was interested in the business, but not as a partner. As there was no dispute about facts, the counsel was right in insisting as matter of law that Eckart was not a partner; and the judge should have so charged the jury.

There are several other questions in the case; but as this goes to the foundation of the action, they need not be considered.

New trial granted.[2]

[1] 20 Wend. 70. And see Story on Part. 49, 56, 72; Coll. on Part. 14, 18.

[2] Affirmed in 3 Comst. 132. It is well settled that a person who is entitled to a share in the profits of a business, as a compensation for services rendered by him as manager, agent, clerk, or servant, is not thereby a partner in fact. Geddes v. Wallace, 2 Bligh, 270; Pott v. Eyton, 3 C. B. 32; Rawlinson v. Clark, 15 M. & W. 292; Stocker v. Brockelbank, 3 Mac. & G. 250; Reg. v. Wortley, 21 L. J. M. C. 44; Harrington v. Churchward, 29 L. J. Ch. 521; Reg. v. McDonald, 31 L. J. M. C. 67; Ross v. Parkyns, L. R. 20 Eq. 331; Seymour v. Freer, 8 Wall. 202, 215 (*semble*); Shropshire v. Shepperd, 3 Ala. 733; Moore v. Smith, 19 Ala. 774; Randle v. State, 49 Ala. 14; Christian v. Crocker, 25 Ark. 327; Hanna v. Flint, 14 Cal. 73; Stevens v. Faucet, 24 Ill. 483; Fawcett v. Osborne, 32 Ill. 411; Macy v. Combs, 15 Ind. 469; Ellsworth v. Pomeroy, 26 Ind. 158; Price v. Alexander, 2 Greene, 427; Reed v. Murphy, 2 Greene, 574; Ruddick v. Otis, 33 Iowa, 402; Shepard v. Pratt, 16 Kas. 209; Bulloc v. Pailhos, 20 Mart. 172; Cline v. Caldwell, 4 La. 137; St. Victor v. Daubert, 9 La. 314; Heran v. Hall, 1 B. Mon. 159; Miller v. Chandler, 29 La. An. 88; Dwinel v. Stone, 30 Me. 384; Kerr v. Potter, 6 Gill, 404; Bull v. Schuberth, 2 Md. 38; Benson v. Ketchum, 14 Md. 331; Crawford v. Austin, 34 Md. 49; Judson v. Adams, 8 Cush. 556; Emmons v. Westfield Bank, 97 Mass. 230; Haskins v. Warren, 115 Mass. 514; Comm. v. Bennett, 118 Mass. 443; Morrison v. Cole, 30 Mich. 102; Clement v. Hadlock, 13 N. H. 185; Newman v. Bean, 21 N. H. 93; Atherton v. Tilton, 44 N. H. 452; Nutting v. Colt, 3 Halst. Ch. 539; Smith v. Perry, 5 Dutch. 74; McMahon v. O'Donnell, 5 C. E. Green, 306; Muzzy v. Whitney, 10 Johns. 226; Vanderburgh v. Hull, 20 Wend. 70; Chase v. Barrett, 4 Paige, 148; Ross v. Drinker, 2 Hall, 415; Mohawk R. R. v. Niles, 3 Hill, 162; Brockway v. Burnap, 16 Barb. 309; Clark v. Gilbert, 32 Barb. 576; Lamb v. Grover, 47 Barb. 317; Osbrey v. Reimer, 49 Barb. 265; Strong v. Place, 4 Rob. 385; Leonard v. N. Y. Co., 41 N. Y. 544; Lewis v. Greider, 51 N. Y. 231; Smith v. Bodine, 74 N. Y. 30; Moore v. Huntington, 7 Hun, 425; McArthur v. Ladd, 5 Ohio, 514; Johnson v. Miller, 16 Ohio, 431; Ditsche v. Becker, 6 Phila. 176; Blight v. Ewing, 1 Pittsb. 275; Dale v. Pierce, 85 Pa. 474; Potter v. Moses, 1 R. I. 430; Bentley v. Harris, 10 R. I. 434; Simpson v. Feltz, 1 McC. Ch. 213; Lowry v. Brooks, 2 McC. 421; Norment v. Hull, 1 Humph. 320; Bell v. Hare, 12 Heisk. 615; Boardman v. Keeler,

SELECT CASES

ON

PRIVATE CORPORATIONS.

CHAPTER I.

DEFINITION OF CORPORATION.

LIVERPOOL, &c. INSURANCE CO. *v.* MASSACHUSETTS.

1870. 10 *Wallace, U. S.* 566.[1]

Error to the Supreme Court of Massachusetts. Bill in equity by State of Massachusetts to collect a tax, and to restrain company from doing further business till the tax was paid.

One question raised in this case was, whether the above Insurance Company is a corporation within the meaning of the Massachusetts Statute imposing upon each fire, &c. insurance company "incorporated or associated under the laws of any government or State other than one of the United States, a tax of 4 per cent upon all premiums charged or received on contracts made in this Commonwealth for insurance of property." The facts as to the nature of the company are sufficiently stated in the opinion.

The Supreme Court of Massachusetts decided that the company was liable to the tax. 100 Mass. 531 [*Oliver* v. *Liverpool, &c. Ins. Co.*].

B. R. Curtis and *J. G. Abbott*, for insurance company.

Charles Allen, Attorney-General of Massachusetts, for State.

Mr. Justice Miller. . . . . These propositions dispose of the case before us, if plaintiff is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

[1] Statement abridged. Arguments and part of opinion omitted. — Ed

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit, which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

4. Its existence as an entity apart from the shareholders is recognized by the act of Parliament, which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights, and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half-century, the importance of which can hardly be overestimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, &c., and the demand for the use of corporate powers in combining the capital and the energy required to conduct these large operations is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized, and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the States of the Union have general laws by which persons associating themselves together, as the shareholders in this company have done, become a corporation.

The banking business of the States of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed that in all the States the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legis-

lative ratification as is given by the acts of Parliament we have mentioned.

To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So also it is said that the fact that there is no provision either in the deed of settlement or the act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

MR. JUSTICE BRADLEY. Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a

corporation. I think it is one of those special partnerships which are called joint-stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the States from imposing taxes or license laws upon either British corporations or joint-stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other States have chosen to take some of their shares. *Judgment affirmed.*

THOMAS *v.* DAKIN.

1839. 22 *Wendell*, 9.[1]

In the Supreme Court of New York. Action brought by plaintiff Thomas as president of Bank of Central New York, an association formed under the General Banking Act of April 18, 1838, to recover several demands alleged to be due to the institution. The declaration alleged the indebtedness to be to the bank, and the promises to have been made to the bank; concluding to the damage of the bank of $10,000; and, therefore, the said plaintiff, as president of the Bank of Central New York, brings suit, &c.

Demurrer to declaration; assigning, in substance, the following special causes: —

1. Plaintiff Thomas has no cause of action.

2. No authority exists in law for plaintiff to sue on behalf of the bank, or upon promises made to the bank.

3. No association of persons not incorporated are entitled by law to bring an action in the name of their president, but only in their individual names.

4. The General Banking Act of 1838, so far as it purports to authorize this suit, is unconstitutional; and also is void because it did not receive the assent of two-thirds of all the members of the legislature.

The Constitution of New York, article 7, section 9, is as follows: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill . . . creating, continuing, altering, or renewing any body politic or corporate."

[1] Statement abridged from facts stated by reporter and from facts stated in the opinions. The arguments are omitted; also the greater part of the opinions. —Ed.

The provisions of the General Banking Act of 1838 are sufficiently stated in the opinion of NELSON, C. J.

C. P. Kirkland, and *S. A. Foote*, for plaintiffs.

Ward Hunt, for defendant.

NELSON, C. J. . . . Are these associations corporations? In order to determine this question, we must first ascertain the properties essential to constitute a corporate body, and compare them with those conferred upon the associations; for if they exist in common, or substantially correspond, the answer will be in the affirmative. A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term *corporation* in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms. It has been well said by learned expounders that a corporation aggregate is an artificial body of men, composed of divers individuals, the *ligaments of which body are the franchises and liberties bestowed upon it*, which bind and unite all into one, and in which consists the whole frame and essence of the corporation. The "franchises and liberties," or, in more modern language, and as more strictly applicable to private corporations, the *powers and faculties*, which are usually specified as creating corporate existence, are: 1. The capacity of perpetual succession; 2. The power to sue and be sued, and to grant and receive in its corporate name; 3. To purchase and hold real and personal estate; 4. To have a common seal; and 5. To make by-laws. These *indicia* were given by judges and elementary writers at a very early day: since which time the institutions have greatly multiplied, their practical operation and use have been thoroughly tested, and their peculiar and essential properties much better understood. Any one comprehending the scope and purpose of them at this day will not fail to perceive that some of the powers above specified are of trifling importance, while others are wholly unessential. For instance, the power to purchase and hold real estate is no otherwise essential than to afford a place of business; and the right to use a *common seal*, or to *make by-laws*, may be dispensed with altogether. For as to the one, it is now well settled that corporations may contract by resolution, or through agents, without seal; and as to the other, the power is unnecessary, in all cases where the charter sufficiently provides for the government of the body. The distinguishing feature, far above all others, is the capacity conferred, by which *a perpetual succession of different persons shall be regarded in the law as one and the same body, and may at all times act in fulfilment of the objects of the association as a single individual.* In this way a legal existence, a body corporate, an artificial being, is constituted; the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man. While the aggregate means and influence of all are wielded in affecting it, the operation is conducted with the simplicity and individuality of a natural

person. In this consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential, are those which are indispensable to mould the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, this legal being created, the powers and faculties that may be conferred are various, — limited or enlarged at the discretion of the legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity: 1. To have a perpetual succession under a special name, and in an artificial form; 2. To take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and 3. To receive and enjoy in common, grants of privileges and immunities.

We will now endeavor to ascertain with exactness the powers and attributes conferred upon these associations by virtue of the statute. The first fourteen sections (1 to 14) prescribe the duties of the comptroller in furnishing notes for circulation, taking the required securities, &c. The 15th provides that any number of persons may associate to establish offices of discount, deposit, and circulation. The 16th, that they shall make and file a certificate, specifying: 1. The *name* to be used in the business; 2. The *place* where the business shall be carried on; 3. The *amount* of capital stock, and number of shares into which divided; 4. The *names of the shareholders;* 5. The *duration* of the association. The 18th confers upon the persons thus associating the most ample powers for carrying on banking operations, together with the right "to exercise such incidental powers as shall be necessary to carry on such business;" also to choose a president, vice-president, cashier, and such other officers and agents as may be necessary. By the 21st and 22d sections, contracts, notes, bills, &c., shall be signed by the president and cashier; and all suits, actions, &c., are to be brought in the name of, and also against the president for the time being; and not to abate by his *death*, *resignation*, or *removal*, but to be continued in the name of the successor. 24th section: The association may purchase and hold real estate, &c., the conveyance to be made to the president, or such other officer as shall be designated, who may sell and convey the same free from any claim against shareholders. 19th section: The shares of capital stock to be deemed personal property, transferable on the books of the association; and every person becoming a shareholder by such transfer, shall succeed to all the rights and liabilities of the prior holder. 23d section: No shareholder to be personally liable; and the association is not to be dissolved by the *death* or *insanity* of any shareholder.

1. Upon a perusal of these provisions, it will appear that the association acquires the power to raise and hold for common use any given amount of capital stock for banking purposes, which, when subscribed,

is made personal property, and the several shares transferable the same and with like effect as in case of corporate stock; to assume a common name under which to manage all the affairs of the association; to choose all officers and agents that may be necessary for the purpose, and remove and appoint them at pleasure. It will hence be seen, that although the association may be composed of a number of different persons, holding an interest in the capital stock, its operations are so arranged that they do not appear in conducting its affairs; all are so bound together, so moulded into one, as to constitute but a single body, represented by a common name, or names (the knot of the combination), and in which all the business of the institution is conducted by common agents. In this way it purchases and holds real and personal property, contracts obligations, discounts bills, notes, and other evidences of debt, receives deposits, buys gold and silver bullion, bills of exchange, &c., loans money, sues and is sued, &c. It is true some portion of the business is conducted in the assumed name, and some in the name of the president for the time being; but this in no manner changes the character of the body. A corporation may have more than one name; it may have one in which to contract, grant, &c., and another in which to sue and be sued; so it may be known by two different names, and may sue and be sued in either; and the name of the president, his official name, or any other, will answer every purpose. 2 Bacon's Abr. 5; 2 Salk. 451; 2 *Id.* 237; Ld. Raym. 153, 680. The only material circumstance is, a name, or names, of some kind, in which all the affairs of the company may be conducted. So much, and no more, is essential to give simplicity and effect to the operation. An artificial being is thus plainly created, capable of receiving all the ample powers and privileges conferred upon the associations, and of managing their diversified concerns in an individual capacity. All business is to be conducted in a common or proper name.

2. This artificial being possesses the powers of perpetual succession. Neither *sale* of shares or *death* of shareholders affect it; if one should sell his interest, or die, the purchaser or representative, by operation of law, immediately takes his place. § 19. Nor can the insanity of a member work a dissolution. *Id.* Officers and agents for conducting the business of the association are secured. In case of vacancy, by death or otherwise, the place may at once be filled. § 18. For the entire duration, therefore, of the association, and which may be without limit, § 16, *sub.* 5, the whole body of shareholders, though perpetually shifting, constitute the same uniform, artificial being which is to be engaged through the instrumentality of officers and agents in conducting the business of the concern, and no member is personally liable. § 23. Then, as to the powers conferred, without again specially recurring to them, it will be seen at once that the associations possess all that are deemed essential, according to the most approved authorities, to constitute a corporate body. They have a capacity: 1. To have perpetual succession under a common name, and in an artificial

form; 2. To take and grant property, contract obligations, to sue and be sued by its corporate name, in the same manner as an individual; 3. To receive grants of privileges and immunities, and to enjoy them in common. All these are expressly granted, and many more, besides the general sweeping clause, "*to exercise such incidental powers as shall be necessary to carry on such business*" (meaning the business of banking), under which even the seal and right to make by-laws are clearly embraced, if essential in conducting the affairs of the institution.

[After considering other questions, the learned judge concludes as follows: —]

Upon the whole, I am of opinion: 1. That these associations are corporations; 2. That the legislature possesses no power to pass a general law like the one under consideration by a *majority bill;* and 3. That they may pass it by two-thirds of the members elected.

The plaintiff is therefore entitled to judgment on the demurrer, with leave to amend on the usual terms.

[COWEN, J., gave an elaborate opinion, concurring with NELSON, C. J., on points 1 and 2. As to point 3, he inclined to agree with NELSON, C. J. His opinion concludes as follows: —]

But this branch of the argument need not be pursued; for it was agreed on both sides, at the bar, that we must, on this record, presume the general banking law to have been passed by two-thirds of all the members elected to both houses. We must clearly do so until the fact is denied by plea. The requisite constitutional solemnities in passing an act which has been published in the statute book, must always be presumed to have taken place until the contrary shall be clearly shown. Should the defendant withdraw his demurrer, and plead specially that the law in question did not receive the assent of two-thirds, as required by the Constitution, it will then be in order to pass upon the validity of such an objection.

Being clear that the plaintiff's declaration is sufficient in substance, and that he has technically and aptly set forth his cause of action according to the statute, I think there should be judgment for him with leave to withdraw the demurrer, and plead on payment of costs.

BRONSON, J. I concur fully in the opinions expressed by my brethren, that associations formed under the general banking law are corporations, and that the assent of two-thirds of all the members elected to each branch of the legislature was necessary to the passing of the act. But, as at present advised, I cannot concur in the opinion that the legislature has the constitutional power, although two-thirds may assent, to provide by a general law for the creation of an indefinite number of corporations at the pleasure of any persons who may associate for that purpose.

It was conceded on the argument, that the demurrer does not reach the objection that the act was not passed by a two-thirds vote; and I have not, therefore, considered the question whether we can look beyond the statute book. A plea may render it necessary for us to pass upon that question. *Judgment for plaintiff.*

GREAT SOUTHERN FIRE PROOF HOTEL CO. *v.* JONES.

1900. 177 *U. S.* 449.[1]

JONES & Co. brought a bill in the U. S. Circuit Court for Ohio, against an Ohio corporation and various other defendants. The bill describes the plaintiffs as "members of the limited partnership association doing business under the firm name and style of Jones & Laughlins, Limited, which said association is a limited partnership association, organized under an act of the General Assembly of Pennsylvania, approved June 23d [2d], 1874, entitled 'An act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances,'" . . . and which association is "a citizen of the State of Pennsylvania."

The claim of Jones & Co. was founded on the mechanics' lien statute of Ohio. The Hotel Company demurred to the bill; contending that the said statute was unconstitutional. After a decision in favor of Jones & Co. in the U. S. Circuit Court of Appeals, the Hotel Company brought the case to the U. S. Supreme Court on a writ of certiorari.

Upon the argument in the Supreme Court, that court suggested the question (not raised by counsel, nor argued in the court below), whether the case as presented by the record was one of which the U. S. Circuit Court could take cognizance by reason of diversity of citizenship.

John E. Sater and *D. F. Pugh*, for petitioner.

Talfourd P. Linn and *Louis G. Addison*, for respondents.

HARLAN, J. . . . We are of opinion that the plaintiff as a limited partnership association was not entitled to invoke the jurisdiction of the Circuit Court. It was not alleged to be, nor could it have alleged that it was, a corporation in virtue of the statute of Pennsylvania under which, according to the averments of the bill, it was organized.

. . . . . .

It has been suggested that the plaintiffs are entitled to sue, and may be sued, by their association name. . . . But the capacity to sue and be sued by the name of the association does not make the plaintiffs a corporation within the rule that a suit by or against a corporation in its corporate name in a court of the United States is conclusively presumed to be one by or against citizens of the State creating the corporation.

. . . . . .

[As to Const. Pa. Art. XVI. Sect. 13.] The only effect of that clause is to place the joint-stock companies or associations referred to under

[1] Statement abridged. Portions of opinion omitted. — ED.

the restrictions imposed by that article upon corporations; and not to invest them with all the attributes of corporations.

We have not been referred to any case in the Supreme Court of Pennsylvania which distinctly places limited partnership associations, created under the statutes of that State, on the basis of corporations.

. . . . . .

That a limited partnership association created under the Pennsylvania statute may be described as a "*quasi* corporation," having some of the characteristics of a corporation, or as a "new artificial person," is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations.

We have not overlooked the case of *Andrews Bros. Co.* v. *Youngstown Coke Co.*, 58 U. S. App. 444, in which the Circuit Court of Appeals for the Sixth Circuit, speaking by Judge Lurton, held that limited partnership associations organized under the Pennsylvania statute were corporations within the jurisdictional requirement of diverse citizenship. For the reasons stated, we are unable to concur in the view taken by that court.

We therefore adjudge that . . . it was necessary to set out the citizenship of the individual members of the partnership association of Jones & Laughlins, Limited, which brought this suit.

. . . . . .

Without considering the merits of the case, we are constrained to reverse the judgments of the Circuit Court of Appeals and of the Circuit Court, and remand the cause for further proceedings consistent with this opinion. Under the circumstances, the plaintiffs should be allowed, upon application, to amend the bill upon the subject of the citizenship of the parties.

. . . . . .

(2) *Distinction between the Association and the Associates.*

CHAPTER VII.

ACTIONS BETWEEN A PARTNER AND ONE OR MORE OF HIS COPARTNERS.

SECTION I.

A Partner cannot maintain an Action against a Copartner upon a Partnership Claim or a Partnership Liability.

Ex parte NOKES.

IN CHANCERY, BEFORE LORD ELDON, C., JUNE, 1801.

[*Reported in* 1 *Montagu & Ayrton*, 47, *note* (*a*).]

PETITION by the bankrupt to supersede the commission, on the ground that there was not a good petitioning creditor's debt.

The petitioning creditor was a partner of the bankrupt; the debt was above £100, but there had been no statement or balance of the accounts.

Romilly, for the bankrupt, contended, that as no action could be maintained at law for this debt, it would not support the commission.

Mr. Mansfield and *Mr. Cooke*, contra.

LORD ELDON. I do not know of any case, and I am strongly inclined to think when a partnership is subsisting, and there is no liquidation of the accounts, though there is actually a balance of above £100 due to one partner, that he cannot upon such debt support a commission; but had the partnership been determined, and had the solvent partner paid all debts, I should think that he might sustain the commission.

There being some dispute as to the fact, it was referred to the Master.[1]

[1] Windham v. Paterson, 1 Stark. 144; Matson v. Barber, 1 Gow, 17.

HOLMES *v.* HIGGINS.

In the King's Bench, November 20, 1822.

[*Reported in* 1 *Barnewall & Cresswell*, 74.]

In September, 1820, notices were given of an intended application to Parliament for leave to bring in a bill for making a railway from Womersley to the river Dun, in the county of York, which notices were given by the plaintiff, describing himself as agent for the intended bill. In December, 1820, a subscription was commenced for the purpose of passing the bill and making the railway; and between that time and the 27th of January following, including the latter day, several persons subscribed to the undertaking, and amongst others the plaintiff subscribed for two shares of £50 each, and the defendant for one. On the 27th January a solicitor to the business was appointed, and was directed to adopt such measures as were necessary to obtain an act of Parliament during the ensuing session, for the above purpose; and on the same day the plaintiff was appointed agent to the company of subscribers, and assistant to the solicitor. These appointments were made at a meeting of the subscribers on the 27th January, at which the defendant acted as chairman, as he did at several other meetings, both before and after. A bill was brought into Parliament the following session, and met with considerable opposition, and was ultimately withdrawn. The money sought to be recovered in the action was for business done and money paid by the plaintiff, as agent to the subscribers to the said undertaking. This cause had been referred to a barrister, who by his award found that the defendant was indebted to the plaintiff in the sum of £324 15*s.*, but delivered to the parties with his award the following certificate: "As it is my wish that the defendant should not be precluded by my award from taking the opinion of the Court of King's Bench, if he shall think proper to do so, upon the objection submitted to me by his counsel, to the right of the plaintiff to maintain the action against the defendant, I certify that it was proved before me, that the plaintiff and the defendant were subscribers to and shareholders in the undertaking, for the benefit of which the work and labor was performed and the expenses incurred by the plaintiff, which formed his demand in the action."

F. Pollock, having in last term obtained a rule *nisi* for setting aside this award,

Brougham now showed cause. Here the parties were not partners or shareholders until a bill was obtained. The action is brought not

for work done in the course of the partnership, but previously to the commencement of it, and therefore the action is clearly maintainable.

ABBOTT, C. J. This is the case of a number of persons jointly associated together for a common purpose. The plaintiff and defendant were both members of the association. This action is brought against the defendant, who acted as chairman at the meeting, when the work done was probably ordered; and he might have pleaded that he undertook jointly with the other subscribers. The members of the association were therefore partners. Now it is perfectly clear that one partner cannot maintain an action against his copartners for work and labor performed, or money expended on account of the partnership. I am of opinion, therefore, that the plaintiff cannot support this action either against the defendant, who was chairman of the meeting, or against the body of subscribers at large. The rule for setting aside the award must therefore be made absolute. *Rule absolute.*[1]

[1] That a partner, whose claim is in reality against the firm, cannot recover any part of his claim by an action against one or more of his copartners is illustrated by the following authorities: —

Claims for Work and Labor performed by the Plaintiff for the Firm. — Milburn *v.* Codd, 7 B. & C. 419; Lucas *v.* Beach, 1 M. & G. 417; Caldicott *v.* Griffiths, 8 Ex. 898; Causten *v.* Burke, 2 Har. & G. 295; Warren *v.* Wheelock, 21 Vt. 323.

Claims for Goods sold by the Plaintiff to the Firm. — Marks *v.* Stein, 11 La. An. 509; Course *v.* Prince, 1 Mill C. R. 416; Remington *v.* Allen, 109 Mass. 47.

Claims for Money lent by the Plaintiff to the Firm. — Perring *v.* Hone, 4 Bing. 28; Colley *v.* Smith, 2 M. & Rob. 96; Mickle *v.* Peet, 43 Conn. 65; Course *v.* Prince, 1 Mill C. R. 416; Crottes *v.* Frigerio, 18 La. An. 283; Springer *v.* Cabell, 10 Mo. 640; Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172.

Claims for Money paid for the Firm. — Robson *v.* Curtis, 1 Stark. 78; Goddard *v.* Hodges, 1 Cr. & M. 33; Brown *v.* Tapscott, 6 M. & W. 119; De Jarnette *v.* McQueen, 31 Ala. 230; Ross *v.* Cornell, 45 Cal. 133; Camblat *v.* Tupery, 2 La. An. 10; Hennegin *v.* Wilcoxon, 13 La. An. 576; Myrick *v.* Dame, 9 Cush. 248; White *v.* Harlow, 5 Gray, 463; Wright *v.* Jacobs, 61 Mo. 19; Harris *v.* Harris, 39 N. H. 45; Ives *v.* Miller, 19 Barb. 196; Torrey *v.* Twombly, 57 How. Pr. 149; Leidy *v.* Messinger, 71 Pa. 177; Fessler *v.* Hickernell, 82 Pa. 150; Warren *v.* Wheelock, 21 Vt. 323; Sprout *v.* Crowley, 30 Wis. 187; Tomlinson *v.* Nelson, 49 Wis. 679.

But see Wheeler *v.* Arnold, 30 Mich. 304; Finlay *v.* Stewart, 56 Pa. 183; Meason *v.* Kaine, 63 Pa. 335.

Claims for Rent of Premises occupied by the Firm. — Pio Pico *v.* Cuyas, 47 Cal. 174, 180; Johnson *v.* Wilson, 54 Ill. 419; Estes *v.* Whipple, 12 Vt. 373.

Similarly, a partner cannot maintain an action against his copartner where the liability of the latter is in reality an obligation to the firm; *e.g.*, —

Liability for Money had and received by the Defendant to the Use of the Firm. — Smith *v.* Barrow, 2 T. R. 476; Fromont *v.* Coupland, 2 Bing. 170; Bovill *v.* Hammond, *supra*, p. 33; Russell *v.* Byron, 2 Cal. 86; Stanton *v.* Buckner, 24 La. An. 391; Pray *v.* Mitchell, 60 Me. 430 (*semble*) (conf. Chase *v.* Garvin, 19 Me. 211; Holyoke *v.* Mayo, 50 Me. 385); Riarl *v.* Wilhelm, 3 Gill, 356; Towle *v.* Meserve, 38 N. H. 9; Young *v.* Brick, 2 Pennington, 663; Graham *v.* Holt, 3 Ired. 300.

Conf. Lewis *v.* Edwards, 7 M. & W. 300; Thomas *v.* Thomas, 5 Ex. 28; Lyon *v.* Haynes, 5 M. & G. 504; Wright *v.* Cobleigh, 21 N. H. 339.

HELME v. SMITH.

IN THE COMMON PLEAS, JUNE 11, 1831.

[*Reported in* 7 *Bingham*, 709.]

THIS was an action by the plaintiff, as part owner and managing owner of the ship "Brailsford," against the defendant, another part owner of the same ship, for his portion of the balance due to the plaintiff for the outfit of the ship for several voyages.

The cause having been referred to arbitration, the arbitrator found specially as follows: —

That the plaintiff was part owner of the ship "Brailsford," and acted as ship's husband thereof during the several voyages in respect of which the claim in this action was made; that the defendant was also owner of one-fourth of the said ship, and interested to the extent of one-fourth in all the said voyages; and that the dealing between the plaintiff and defendant, in respect of which this action was brought, was upon the footing of the defendant being owner of one-fourth, and interested as aforesaid. He then awarded and adjudged that the said plaintiff do recover against the defendant in the action the sum of £462 8*s*. 6*d*., being the balance due at the time of the commencement of the suit from the defendant, as such owner of one-fourth part of the ship "Brailsford" to the plaintiff as such part owner thereof, for the share of the defendant of the expenses incurred and paid by the plaintiff as managing owner or ship's husband, as aforesaid, for the outfit of the said ship for four several voyages, being the voyages aforesaid, while the defendant was such part owner and interested as aforesaid.

No account having been stated or settled between the parties, no express contract to account having been proved before the arbitrator, but all the voyages having been concluded, and the ship sold, as hereafter mentioned, before this action was brought, if the court should be of opinion that an action was not maintainable by one part owner against another for the cause, and under the circumstances aforesaid, then he awarded that the verdict for the plaintiff should be set aside, and a nonsuit entered in lieu thereof.[1]

Wilde, Serjt., having obtained a rule *nisi* to enter up judgment for the plaintiff for £462 8*s*. 6*d*., pursuant to the award,

Jones, Serjt., showed cause. Whether the plaintiff was a partner in the ship, or in the particular adventure of the four voyages, Bovill *v*. Hammond, this action does not lie, unless there has been a balance

[1] A portion of the case not relating to the law of partnership has been omitted. — E.

struck, and a promise to pay the amount. The plaintiff's remedy is in equity. A part owner is a partner; at all events, he may be so; and the dealings between these part owners — the sale of the ship on their joint account, and the allowance of the proceeds of the sale against the expense of the adventure — show that they shared in profit and loss, which is the test of a partnership. But, according to *Ex parte* Christie[1] and Strelly *v.* Winson,[2] a part owner is generally deemed a partner. In Holderness *v.* Shackels,[3] it was held that part owners of a whaling-ship had a lien on each other's share of the proceeds of the adventure, for the contribution of each towards the disbursements of the ship, but it was not decided that one could sue the other for his share of such disbursements.

Wilde was requested by the court to confine himself to the first point. A ship's husband is entitled to recover for the expenses of outfit, whether he be part owner or not. Those expenses are a separate undertaking, and independent of the profits of the adventure in which the ship is employed. As if one of four owners of a house were to paint or repair it, he might clearly sue the others for their share of the expense. *Ex parte* Christie has no application to the question; and in *Ex parte* Young[4] it was held that part owners of a ship are tenants in common, and not joint tenants.

TINDAL, C. J. On looking at this award, the question arises, whether an action will lie by one part owner of a ship against another for his share of the expenses of outfit.

If, indeed, the plaintiff and defendant were partners, there is an end of the question; but part owners of a ship are not necessarily partners. If the parties had laid out money on a speculation in goods, the proceeds to be divided on the ship's return, they would have been partners in every sense; but there is nothing here to show that they were more than part owners, and the question is, whether, if one lays out money to enable the ship to proceed, he may not sue each of the owners for his share of the expense. There is nothing to show that the plaintiff's claim was to depend on the profits of the voyage, or that he was to be deprived of remuneration if the voyage turned out to be without profit. The outfit was a portion of the capital which each was to advance, and if the plaintiff had lent either of the part owners the capital he was to contribute, that would clearly have formed the ground of a separate claim. It might have been otherwise, if, by the course of trade, it were the custom for a ship's husband to look to the returns of the ship for the payment of his bill; but no such custom is stated on the award, nor anything to show that the plaintiff and defendant were partners.

[1] 10 Ves. 105.
[2] 1 Vern. 297.
[3] 8 B. & C. 612.
[4] 2 Ves. & B. 242.

PARK, J. The difficulty has arisen from confounding the character of the parties. The case has been argued as if this were a strict partnership; but it is not so. The plaintiff lays out his money in furnishing tackle and provisions for the ship, for which, even if he were a partner, he would be entitled to recover the same as any other tradesman. Even in an ordinary partnership, if one of five or six were to advance to each of the others his share of the capital as a loan, he would be entitled to sue him separately; and why not the plaintiff, for the money he has laid out on the ship? He would be clearly entitled to sue for such expenses if he were not a part owner, and his being part owner does not in this respect alter his situation.

GASELEE, J. The difficulty I have is to ascertain at what time an undertaking of this nature becomes a partnership. No doubt, if one partner advances capital to another, he may recover it by action; but my difficulty is to know whether the expenses of outfitting a ship should form a portion of the general account to be charged at the end of the voyage, or may be claimed at once. Here there were four outfits; and, if they had been on a separate account, they might have been settled at the commencement of each voyage. I feel some difficulty; but no authority has been cited to induce me to differ from the rest of the court.

BOSANQUET, J. I think the plaintiff is entitled to the full sum given to him by this award. As ship's husband, he was agent for the other owners, and a sum is found due to him in respect of the outfit. Before a voyage, it is the duty of each owner to contribute his share of capital for the expenses of the outfit. Here the ship's husband, being a part owner, at the request of the others, advances their share for them: that constitutes a debt which he is entitled to recover, independently of the profits of the voyage. Of those profits we know nothing; but the debt is found; the ship was sold, and the proceeds applied in reduction of the plaintiff's claim; and whether the interest in the ship was a partnership or not is immaterial, because in either case the proceeds of the sale might properly be applied in reduction of a debt due from the concern. *Rule absolute.*[1]

[1] *Ex parte* Young, 2 V. & B. 242 (overruling Doddington *v.* Hallet, 1 Ves. 497); *Ex parte* Harrison, 2 Rose, 71; *Ex parte* Gibson, 1 Mont. Part. (1st ed.) 102, n.; Green *v.* Briggs, 6 Hare, 395; Jackson *v.* Robinson, 3 Mason, 138; Harding *v.* Foxcroft, 6 Greenl. 76; Knowlton *v.* Reed, 38 Me. 246; Thorndike *v.* DeWolf, 6 Pick. 120; Ward *v.* Bodeman, 1 Mo. App. 272; Nicoll *v.* Mumford, 4 Johns. Ch. 522; Hopkins *v.* Forsyth, 14 Pa. 34, *accord.*

Conf. Holderness *v.* Shackels, 8 B. & C. 612. — ED.

The judgment of the Supreme Court, therefore, should be affirmed with costs.

All the judges concurring, *Judgment affirmed.*[1]

CHARLES C. STEVENS *v.* JOHN R. PERRY AND ANOTHER AND TRUSTEE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER TERM, 1873.

[*Reported in* 113 *Massachusetts Reports*, 380.]

TRUSTEE process. The writ commanded the officer "to attach the goods or estate of John R. Perry and Patrick Grimes, copartners under the name and style of Perry & Grimes," and to summon the Bay State National Bank as trustee.

The corporation filed this answer: "And now comes the Bay State National Bank, and, for answer, say, that they had in their hands and possession, at the time of the service of the plaintiff's writ upon them, no goods, effects, or credits of the said firm of Perry & Grimes, the defendants, and of this they submit themselves to be examined on oath, and ask to be discharged. And for a farther answer, they say that, at the time of the service of said writ upon them, to wit, on the ninth day of May, 1872, they had in their hands and possession, of the individual goods, effects, and credits of said John R. Perry, one of said firm, the sum of $922.77, but that since said service, to wit, on the twenty-third day of said May, said individual effects of said Perry have been attached to the amount of $1,800, on a writ sued out of this court and returnable at the September Term thereof, wherein the Swampscott Machine Company is plaintiff, said John R. Perry is defendant, and said bank is made trustee. Wherefore they ask to be discharged, and of this they submit themselves to be examined on oath."

The corporation appealed from an order charging it as trustee upon this answer.

[1] *Re* Lewis, 8 N. B. R. 546; *Re* Sandusky, 17 N. B. R. 452; Cleghorn *v.* Ins. Bank, 9 Ga. 319; Baker *v.* Wimpee, 19 Ga. 87; Gillaspy *v.* Peck, 46 Iowa, 461; Allen *v.* Wells, 22 Pick. 450; Wisham *v.* Lippincott, 1 Stockt. 353; Howell *v.* Teel, 29 N. J. Eq. 490; Cummings's Appeal, 25 Pa. 268; Baker *v.* Finney, 2 Pears. (Pa.) 177, Kuhne *v.* Law, 14 Rich. 18 (overruling Roberts *v.* Roberts, 8 Rich. 15); Bardwell *v.* Perry, 19 Vt. 292 (conf. Shedd *v.* Wilson, 27 Vt. 478); Straus *v.* Kerngood, 21 Grat. 584, *accord.*

Jarvis *v.* Brooks, 23 N. H. 136; Crockett *v.* Crain, 33 N. H. 542 (but see Bowker *v.* Smith, 48 N. H. 111); Woddrop *v.* Ward, 3 Dess. 203, *contra.* — ED.

C. U. Bell, for the trustee.

A. R. Brown and *E. A. Alger*, for the plaintiff.

AMES, J. It is well settled as matter of law in this Commonwealth, that, in a suit against two or more copartners upon their joint debt, the separate property of any one of the partners may be attached, and the lien so acquired is not discharged or impaired by a subsequent attachment of the same property upon a suit in favor of a separate creditor of the same partner. Allen *v.* Wells ; [1] Newman *v.* Bagley.[2] The Supreme Court of New Hampshire has in several cases held otherwise. Jarvis *v.* Brooks ; [3] Bowker *v.* Smith.[4] But we must consider ourselves bound by our own decisions. As the debt due from the partners jointly is also due from each, it may be enforced against the separate property of each. It is immaterial whether this separate property is in the form of goods and movable chattels, or goods, effects, and credits intrusted and deposited in such a manner that they can only be attached upon a trustee process. It is not necessary that the principal debtors should have made a joint deposit, or that the fund should belong to them jointly. It is enough if funds attachable upon a trustee process are due from the alleged trustee to either one of the principal defendants.

Trustee charged.[5]

[1] 22 Pick. 450.
[2] 16 Pick. 570.
[3] 23 N. H. 136.
[4] 48 N. H. 111.
[5] Straus *v.* Kerngood, 21 Grat. 584, *accord.*
Weaver *v.* Weaver, 46 N. H. 188, *contra.* — ED.

CHAPTER XXV.

STATUTORY LIABILITY OF STOCKHOLDER TO CREDITOR OF CORPORATION, OVER AND ABOVE STOCKHOLDER'S LIABILITY TO PAY IN FULL THE AMOUNT SUBSCRIBED BY HIM FOR STOCK.

CARR *v.* IGLEHART.

1854. 3 *Ohio State*, 457.[1]

RESERVED in Hamilton county.

Oliver, for complainant.

Coffin & Mitchell, for defendant.

PER CURIAM. This is a bill in chancery to collect the amount due upon three bank bills, issued by the Lebanon Miami Banking Company, for the payment, in the aggregate, of the sum of five dollars. It is founded upon the idea that the defendants, who were stockholders in the bank when the bills were issued, are individually liable for its debts. This liability is not deduced from any independent contract by which they undertook to pay the debts, for no such contract is alleged. Nor does it rest upon the ground that they have received the assets of the corporation which were bound for its liabilities, for no such fact is stated. Nor is it pretended that there is, in the charter of the bank, any provision, that, either expressly or by necessary implication, makes its stockholders personally responsible. It is upon neither of these grounds that relief is sought. The ground upon which we are asked to sustain the bill is, that stockholders in a corporation are individually liable for its debts, unless, by some provision of the charter or statute law, they are exempted from such responsibility. The counsel for the complainant admits that Blackstone, and divers other eminent writers upon the law, and also certain courts, have entertained a contrary opinion; but he is very clear they were all wrong, and he hopes and

[1] Only so much of the opinion is given as relates to a single point. — ED.

thinks this court will not be governed by such loose and inconsiderate expressions, either of text-writers or judges.

After a careful consideration of the elaborate and learned argument of counsel, we are unable to perceive that he has established the liability of the defendants. We suppose that no law is better settled than that they are not liable.

Again, the subject of this suit is too trivial.

[The opinion on this point is omitted.]

For the reasons stated, the demurrer to the bill must be sustained, and the bill dismissed.

TRUSTEES OF FREE SCHOOLS IN ANDOVER *v.* FLINT.

1847. 13 *Metcalf* (*Mass.*), 539.

THIS was an action of assumpsit, to recover the amount of the following note: "Andover, August 1st 1836. The Andover Mechanic Association, for value received, promise to pay to the Trustees of the Free Schools in the South Parish in Andover, or their order, three hundred ninety eight dollars, forty one cents, on demand with interest. John Flint, Treasurer." On the back of this note were six indorsements of a year's interest; the last indorsement bearing date October 4th 1842.

The parties submitted the case to the court upon the following agreed statement of facts: The plaintiffs were incorporated by *St.* 1801, *c.* 9. The Andover Mechanic Association was incorporated by *St.* 1821, *c.* 40, "with power," among other things, "to make by-laws for the management of said corporation and its funds, and to have all the privileges usually given, by acts of incorporation, to charitable societies." On the 27th of February 1822, at a meeting of said association, certain by-laws were adopted, which were afterwards printed and distributed, the eleventh article of which was in these words: "The members of this association pledge themselves, in their individual as well as their collective capacity, to be responsible for all moneys loaned to this association, and for payment of which the treasurer may have given his obligation agreeably to the direction of the directors."

The plaintiffs recovered judgment against said association, on the note which is now sought to be enforced against the defendant, and took out execution on said judgment, which execution was returned wholly unsatisfied, before the commencement of this action. Before this action was commenced, to wit, on the 16th of October 1845, the plaintiffs made a demand on the defendant, as a member of said association, to pay the sum now sought to be recovered. The defendant has been a member of said association from the time of its organization to the present time, and was treasurer thereof from its organiza-

tion to the 1st of January 1840. The number of the members of said association is about thirty.

The plaintiffs offer to prove, (if the proof be admissible,) by one witness, that she was a creditor of said association; that her demand remained unpaid; that when she lent money to said association, the defendant was treasurer; that she inquired of him as to the security of said corporation, and that he, in reply, informed her that the individual members of said association were liable for its debts; and that the same statement was made to her by the defendant's successor in the office of treasurer.

The plaintiffs also offer to prove by another creditor of said corporation, that when he made a loan to said corporation, the defendant was treasurer, and that he stated to the witness that he considered the individual members of the corporation liable for its debts, and at the same time furnished the witness with a copy of the said by-laws: That the witness gave said copy to another person, who will testify that he afterwards made a loan to said corporation, being induced by, and under the supposition of, the liability of the members.

The plaintiffs also offer to prove, by the testimony of a member of said association, that he and the other members thereof, so far as he knows, considered themselves liable individually for its debts; that he had attended their meetings, at which he had heard the subject spoken of by members; but that he does not know whether the defendant was present at those meetings.

The said association, on the 25th of April 1845, made an assignment for the benefit of its creditors; but the plaintiffs refused to become parties thereto.

At the time of the loan of the money sought to be recovered in this action, the defendant was treasurer of the Trustees of the Free Schools in the South Parish in Andover, (the plaintiffs,) as well as treasurer of the said Andover Mechanic Association. He resigned the office of treasurer of the plaintiffs on the 12th of December 1836.

If the aforesaid testimony be admissible, the court may draw the same conclusions therefrom which a jury would be bound to draw.

Stevens, for the plaintiffs.

Hazen, for the defendant.

DEWEY, J. The original contract was made by the plaintiffs with the Andover Mechanic Association. The plaintiffs received, for the money lent to that corporation, their negotiable note duly signed by their treasurer. Such was the form of the contract, and such has been the character given to the original promise, in the subsequent steps taken by the plaintiffs to enforce the collection of this demand. No liability, on the part of the defendant, arises from the force of the instrument given to the plaintiffs; but, if it exist at all, it is to be established by independent facts creating such liability, or by some legal enactment charging the defendant for the debts of the corporation.

Upon looking at the act incorporating the Andover Mechanic Association (*St.* 1821, *c.* 40,) we find it in the usual form of acts of incorporation, giving a corporate name and corporate powers, but imposing no individual liability on its members for the debts of the corporation. Individual liability, as incident to membership of a corporation, arises only from express legislative enactment, either in the charter, or by some general law, to which all similar corporations and their individual members are made subject. But there is no general law applicable to this species of corporations, such as exists in reference to manufacturing corporations, or corporations for banking purposes, providing certain liabilities on the individual stockholders of such corporations, in certain specified cases.

The plaintiffs, aware of this difficulty in any attempt to charge the defendant, by force of the provisions in the act of incorporation, or by reason of any general law imposing such liability on the defendant for the debts of the corporation, seek to establish their right to recover, in the present action, upon other grounds. For this purpose they rely upon the eleventh article of the by-laws of the corporation, adopted by its members soon after the passing of the act of incorporation. That by-law is in these words: [Here the judge recited the by-law, as set forth, *ante*, page 876.] The only effect that can be given to this by-law is that of an act or vote of the members of the corporation acting in their corporate capacity. It is not the act of any individual member, nor does the fact of its being found upon the records of the corporation, as a vote duly adopted, authorize the inference that all or that any number greater than a bare majority voted for its adoption. The question then arises, whether it be competent for an aggregate corporation, whose act of incorporation imposes no individual liability upon its members for the debts and contracts of such corporation, to render, by force of a by-law, each individual member a guarantor or surety for all moneys lent to the corporation. It is clearly quite foreign from the general purposes and objects, in reference to which by-laws are authorized to be made by corporate bodies. See Rev. Sts. *c.* 44, § 2, giving authority to corporations to make by-laws.

It is not, in the opinion of the court, within the corporate powers conferred upon this and similar corporations, to impose upon their members, by any such by-law, any personal and individual liability to third persons, beyond such as are specified in the charter, or in the general laws of the Commonwealth. Such a power would be liable to great abuse, and would subject every member of a corporation, however liberal its charter in excluding individual liability, to be made responsible for the entire indebtedness of the corporation by the act of a majority of those convened at a meeting of such corporation. Take the case of a bank in doubtful credit, and its active managers deem it useful to sustain it by pledging the individual responsibility of some of its more wealthy stockholders. Can they, by a corporate vote, impose upon all the stockholders a personal liability for all the debts of the

SHAW, C. J., IN GRAY *v.* COFFIN.

1852. 9 *Cushing* (*Mass.*), 199.

To create any individual liability of members for the debt of a corporation, a body politic, created by law, and regarded as a legal being, distinct from that of all the members composing it, and capable of contracting and being contracted with as a person, is a wide departure from established rules of law, founded in considerations of public policy, and depending solely upon provisions of positive law. It is, therefore, to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute.[1]

1 "Statutory liability" must, of course, depend, in every case, upon the terms of the particular statute in question. Legislative enactments on this subject have varied widely in different States at the same date, and in the same State at different dates. Owing to this diversity in the statutes, the decisions in one State may frequently afford very little assistance in other States. In the first edition of this work a space of more than fifty pages was occupied by cases bearing on questions likely to occur under this kind of legislation. It has not been thought expedient to reprint those cases in this edition.

The cases in the first edition, which have been omitted here, are as follows: *Moyer* v. *Pa. Slate Co.*, 71 Pa. State, 293; *Rider* v. *Fritchey*, 49 Oh. State, 285; *Brown* v. *Eastern Slate Co.*, 134 Mass. 590; *Harger* v. *McCullough*, 2 Denio (N. Y.), 119; *Willis* v. *Mabon*, 48 Minnesota, 140; *Cochran* v. *Wiechers*, 119 New York, 399; *Diversey* v. *Smith*, 103 Illinois, 378; *Flash* v. *Conn*, 109 U. S. 371; *Derrickson* v. *Smith*, 27 New Jersey Law (3 Dutcher), 166; *Huntington* v. *Attrill*, L. R. (1893), App. Cases, 150; *Marshall* v. *Sherman*, 148 New York, 9.

If the last four cases had been reinserted in the present edition, reference would probably have been made, in that connection, to the following recent decisions: *Whitman* v. *National Bank of Oxford*, 176 U. S. 559; *Crippen* v. *Laighton*, 69 New Hampshire, 540; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39; *Howarth* v. *Lombard*, 175 Mass. 570. — ED.

JOHN FOSTER & SON LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

1893. *L. R.* (1894) 1 *Q. B.* 516.[1]

Case stated by Commissioners of Inland Revenue.

The Stamp Act imposes an *ad valorem* duty "upon conveyance or transfer on sale of any property." The consideration, as appears from another clause of the Act, need not always be money, but may be stock or marketable securities. The Act provides that the term "conveyance on sale" includes every instrument "whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction."

Eight persons, who had for many years carried on business in partnership as John Foster & Son, being desirous that the firm should be reconstructed as a Limited Company (registered with limited liability under the Companies Acts), agreed to terminate their partnership, and to transfer all the firm property to a Limited Company, styled John Foster & Son Limited, to be formed of all the partners exclusively for the purpose of taking over the same subject to all the liabilities; the whole of the ordinary shares, preference shares, and debenture stock of the company to be allotted among the partners in proportion to their respective shares in the partnership estate. In accordance with this agreement, by deed of indenture between the eight persons who composed the partnership and the Limited Company, registered under the Companies Acts under the name of John Foster & Son Limited, all the partnership property was conveyed to the Limited Company.

The Commissioners assessed an *ad valorem* duty upon the deed, as coming under the head of a "conveyance or transfer on sale."

In the Queen's Bench Division, Cave, J. held that the assessment was erroneous, and Wright, J. took the opposite view. Wright, J., withdrew his judgment, and the appeal from the Commissioners was allowed.

From this decision of the Divisional Court, the defendants appealed to the Court of Appeal.

Sir Charles Russell, A. G., and *Danckwerts* (*Sir John Rigby*, S. G., with them), for appellants.

Finlay, Q. C., and *A. R. Kirby*, for respondents. [Argument as condensed in 69 L. T. N. S. p. 817.]

In order to constitute a sale there must be two different parties capable of making an agreement, and there must be two different things, the property sold and the price given for it. In the present case there has merely been a re-arrangement of ownership. The parties remained the same, and nothing was parted with, and nothing was given. It

[1] Statement abridged. Opinions in Queen's Bench Division, and part of arguments, omitted. — Ed.

was like a conveyance of property to trustees upon trust to carry on the business, and divide the proceeds arising from it amongst the conveying persons.

LINDLEY, L. J. I confess that, with great deference to CAVE, J., I cannot see the difficulty in this case.

The material sections of the Act of 1870 must first be considered. [The Lord Justice then read ss. 70 and 71 of the Stamp Act, 1870, and continued]: The importance of s. 71, to my mind, is this: it shews that there may be a conveyance on sale, although the consideration for it is not cash or money, but may include or consist of stock or marketable securities. The definition of "stock" and "marketable securities" will be found in s. 2. Then s. 78 imposes a stamp duty on conveyances not otherwise charged, and the schedule shews what the stamps are that are imposed upon conveyances that are charged. First we have "conveyance or transfer whether on sale or otherwise," of certain stocks and dividends. The present case does not come within that head. Then we have "conveyance or transfer on sale, of any property" . . . "where the amount or value of the consideration for the sale does not exceed £5." That fits in with ss. 70 and 71. Then we come to "Conveyance or transfer by way of security of any property or of any security;" and then we have "Conveyance or transfer of any kind not hereinbefore described." We must accordingly consider under which of these heads the particular deed in this case comes. It certainly does not come under the first, nor under "conveyance or transfer by way of security of any property," and the alternative is between "conveyance or transfer on sale" and "conveyance or transfer of any kind not hereinbefore described."

Now, the document in this case is an indenture made between eight gentlemen of the first eight parts, and "John Foster & Sons Limited (hereinafter called 'the company'), of the 9th part." Pausing there for a moment: although the persons of the first eight parts may be, and were members, and the only members, of John Foster & Co. Limited, John Foster & Co. Limited is not those eight individuals; John Foster & Co. Limited, is a corporation. We have accordingly two parties, one party consisting of several individuals, and the other party consisting of a corporation. Whether they are or are not the members, or the only members of the corporation, is wholly immaterial. The corporation is a totally different person from them in any capacity you choose to assign to them except a corporate one. [The Lord Justice then stated the recitals in and the operative part of the conveyances, and continued]: —

Then the parties of the first eight parts put their seals to the instrument, and the company puts its seal to it. Now, what is that instrument? It is certainly a conveyance of property; that is obvious. In order to amount to a conveyance of property there must be a person conveying and a person taking, and you have them both here. The persons conveying are the persons named in the first eight parts, and the persons taking are the corporation named in the ninth part.

Now, what is the consideration? The consideration for the transfer of this property is, I agree, not money, but it is stocks and securities, which for this purpose are to be regarded as equivalent to money by reason of s. 71 of the Act to which I have already alluded. Then what have we got? To sum it up shortly, it is a conveyance of property from one person to another, for money, or what is, according to the provisions of the statute, equivalent to money. What is that except a conveyance on sale? What else can you call it? It is certainly not a gift; it is not an exchange; it is not a partition; it is not a mortgage. I do not know what it is unless it is a conveyance on sale. I do not know what is necessary to constitute a sale, except a transfer of property from one person to another for money, or for the purposes of the Stamp Act, for stock or marketable securities.

But then it is argued that it is only a redistribution of property. I do not consider it a redistribution at all. It is an entire transfer of property from one set of people to another person altogether, and whether there are, as there may well be hereafter, additional persons taking shares in this company, is perfectly immaterial.

Again it is argued on behalf of the appellants that this instrument is in substance nothing more than a conveyance to a trustee to carry on the business in trust for the grantor. Just try that. Supposing there is a conveyance by half-a-dozen people, transferring their property to a trustee on trust to carry on the business for them, can you in any sense of the word, legal or business-like, or otherwise, call that trustee a buyer? There is no buying, there is no sale to him at all, nor is there any money, or stock, or securities, or anything else parted with by him. Then it was urged that these shares can derive no value unless the company gets this property transferred to them. That is possible enough. That is to say, in other words, that the shares in the company would be valueless unless the company had assets. Of course they would be, but that does not affect the question whether there is a sale or a conveyance or not. I think myself that CAVE, J., has attached too little importance to the fact that you have here a distinct seller, and a distinct buyer, and that in point of law it is immaterial that in the present case the buyer is a corporation which consists of the eight persons who formed, and who are, the partners. The appeal must be allowed.

KAY, L. J. I am of the same opinion. With deference to CAVE, J., it seems to me impossible to hold that this transaction was anything else than a conveyance on sale. As pointed out on the face of the statute, the consideration may be money or money's worth. Money's worth certainly is sufficiently expressed by a number of shares and debentures of an existing corporation, which, in effect, constituted the consideration for the particular transfer in this case. Now, that there was a conveyance is beyond all question. The persons who are named as vendors in the deed have divested themselves of their property in the subject of that conveyance, and all that property is vested in an entirely

independent and separate body, — namely, a corporation. Suppose that corporation had consisted of altogether different persons, no one for a moment would doubt that this was a conveyance on sale. Suppose there had been one person in it different, there is nothing that I have heard in the argument which induces me to suppose that even in that case it could have been doubted that this was a conveyance on sale. But the argument, as I understand it, is this, — that the individual corporators who composed that corporation were, in fact, the very identical persons who were conveying this property to the corporation, and the corporation had no other property except this which it took under its conveyance; and that, as the only value of the shares and debentures was derived from this very property which the individual corporators were conveying to the corporation, the conveying partners either got no consideration for that which they conveyed other than part of the property actually conveyed, or they got no consideration at all. Now, I do not follow that argument in the least. I think it is a fallacy from beginning to end. In the first place, a corporation is a different thing from the individuals who compose it; and, secondly, the shares and debentures of a corporation are not the same thing as the property which that corporation owns. You may say, in one sense, that the property is a security for the value of those shares. The value of those shares in the market, which observe are immediately transferable, may depend upon the solvency of the company, the amount of property it possesses, and its chance of carrying on a profitable business. To say that the shares and debentures are part of that property seems to me to be a complete confusion of terms. Suppose the case, which I put during the argument, of a sale of real estate, and the whole of the purchase-money not to be paid at once in cash, but to be secured on mortgage on that real estate; and, if you like, in order to make the analogy perfect, suppose the purchaser had no other property than that property, would the transaction be the less a sale for that reason? Still the consideration given would be a certain amount of cash which would be left on the security of the estate; but I have never yet heard that because the whole of the purchase-money upon a sale of real estate was left on mortgage of the real estate, that for that reason the transaction ceased to be, or was prevented from being, a sale. Yet, really, that is what the argument in this case comes to. I confess I am not able to agree with it. Nothing else was suggested which should prevent this transaction from being a sale, and it seems to me clearly to be, under the words of this statute, "a conveyance on sale" for a consideration, which, if not money, at least is money's worth. I, therefore, with all deference to CAVE, J., think that his decision must be reversed, and the appeal allowed.

A. L. SMITH, L. J. The question in this case is whether the instrument of November 27, 1891, is a conveyance or transfer on sale of any of the property mentioned under the second head — "conveyance or transfer" — in the schedule to the Stamp Act of 1870.

Now, in order to find out what is, or is not, a conveyance or transfer on sale of any property in that second head of the schedule, I must refer to ss. 70 and 71 of the Act. And, reading both these sections together, it seems to me that the term "conveyance on sale" includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser in consideration of any stock or marketable security. That is the definition.

First of all, then, is this an instrument whereby any property is transferred to or vested in the purchaser? I beg to say, Yes. It is an instrument upon the face of which the actual land of the vendors, and the trade-marks which are their property, are transferred to a limited company. I do not think that this is disputed, and it does not appear to me to be disputed so far, in the judgment of my brother CAVE; but what he says is that this is not an instrument whereby any property, upon the sale thereof, is transferred. The real pith of his judgment is that the vendors and vendees are the same persons — that the agreement as regards the sale was carried out by the members of the old firm before any company limited came into existence, and that inasmuch as they are the same persons now as then, there is no sale at all; and, therefore, there is no instrument whereby any property upon the sale thereof is transferred. I must here respectfully differ with my brother CAVE. It seems to me that the company limited are not the same persons as the eight members of the old firm — they are different altogether. It was admitted by Mr. Finlay in argument, though he entirely took away the ground from under my brother CAVE's feet when he said so, that the company limited could maintain a suit for specific performance against the old partners. If that is so, how can they be the same persons? This really shews that they are not the same persons. It is here that I disagree with my brother CAVE.

The respondents also contend that there was no consideration. We must read the two sections together. Sect. 70 enacts that: "The term 'conveyance on sale' includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser." Then s. 71 implies that it may be in consideration of any stock or marketable security. The land and the trade-marks are transferred by this instrument from the eight partners who were the old firm to the new company limited. The land and trade-marks are transferred by this instrument in consideration of what? In consideration of stock or marketable securities, which, undoubtedly, are not the same things as the land and trade-marks themselves, though they may be charges upon the land and trade-marks which are conveyed. It seems to me that it is untrue to say that in this transaction there has been no consideration passing from the vendee to the vendor. Although charges upon the land and the trade-marks, the consideration comes within the very terms of s. 71 itself, — "any stock or marketable security."

For these reasons, I prefer the judgment of my brother WRIGHT to that of my brother CAVE. *Appeal allowed.*

COOK *v.* CITY OF BURLINGTON.

1882. 59 *Iowa*, 251.

THE plaintiffs are the executors of the estate of James W. Grimes, deceased. They are residents of the city of Burlington, where the estate is situated. Part of the estate consists of shares of stock in the Dunleith and Dubuque Bridge Co., which is a corporation of that name, incorporated under the general incorporation laws of the State of Iowa, and having its principal place of business in Dubuque county. The corporation owns a bridge across the Mississippi River, from the city of Dubuque, Iowa, to the eastern shore of the river in the State of Illinois, and said bridge is all the tangible property owned by the corporation. The bridge was assessed for taxation at Dubuque, and the taxes were paid. The shares of stock in the bridge company held and owned by the estate of Grimes were also assessed for taxation for the same year at the city of Burlington. The plaintiffs claimed that the stock was not liable to taxation, and appealed from the board of equalization of the city of Burlington to the Circuit Court. Upon a trial in the Circuit Court it was held that the assessment of the stock was authorized by law, and plaintiffs appeal.

Hedge and *Blythe*, *Shiras*, *Van Duzee* and *Henderson*, for appellants.

C. L. Poor, for appellee.

ROTHROCK, J. — The assessment of the bridge as the property of the corporation was authorized by law. *Appeal of The Des Moines Water Company*, 48 Iowa, 324. Whether the shares of stock can be legally assessed and taxed as the property of the stockholders for the same year for which the property of the corporation is assessed and taxed was not determined in that case. It was said, however, that "the statute provides that the stock of such corporations shall be assessed at its cash value. When assessed and taxed under the statute, stock must be taxed as the property of the respective owners, and there is no provision making the corporation liable therefor."

We have then the question in this case whether the shares of stock may be taxed in addition to the taxation of the property of the corporation.

And we may say, once for all, at the outset, that our views, as expressed in the case just cited, that the statute provides that the stock shall be assessed and taxed, remains unchanged. This conclusion is not founded upon any doubtful construction of the statute, but upon its plain, certain and unequivocal language and meaning. The statute imposing this burden upon the stock is found in section 813 of the Code, and is as follows: "Depreciated bank notes and the stock of corporations and companies shall be assessed at their cash value,* * * *."

It is idle to contend in the face of this plain and explicit language that the legislature has not required that stock in corporations shall be assessed, and the only question now for determination is, does the legislature have the power to determine that the property of a corporation and the stock shall both be taxed.

Counsel for appellants contend that no such power exists, because it is duplicate or double taxation of the same property, and it is insisted that "this court has over and over again declared that double taxation is forbidden by our Constitution." If this statement were correct, and we should concede that the question here presented were one of duplicate taxation, the case could easily and speedily be disposed of by a prompt reversal. But, while it is true that this court in *Tallman* v. *Butler County*, 12 Iowa, 534, said that it "is neither the policy nor the justice of the law to tolerate double taxation," and in *U. S. Express Co.* v. *Ellyson*, 28 Id., 378, that "double taxation would be so unjust as to excite disfavor of both courts and legislature," and in *McGregor's Executors* v. *Vanpel*, 24 Id., 436, that mortgages upon real estate should be held to be taxable "unless this will lead to double taxation," yet it never has been held in this State, that what is denominated duplicate taxation is in excess of the legislative power. The most that can be said of these utterances of this court is, that it should be held in disfavor by courts and legislatures.

In Cooley on Taxation, 165, it is said: "It has properly and justly been held that a construction of the laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute or by necessary implication."

Upon the question as to whether the imposition of taxes upon the property of a corporation and upon the shares of stock in the hands of stockholders, the general observations upon the subject of duplicate taxation found in Cooley on Taxation, page 159, seem to us to be appropriate to be here quoted. It is there said: "A system of indirect taxes, combined with a system of general taxation by value, must often have the effect to duplicate the burden upon some species of property or upon some persons, and the taxation of stockholders of a corporation and also of the corporation itself, must sometimes produce a like result. There is also, sometimes, what seems to be double taxation of the same property to two individuals, as where the purchaser of property on credit is taxed on its full value while the seller is taxed to the same amount on the debt * * * *. Now, whether there is injustice in the taxation, in every instance in which it can be shown that one individual, who has been directly taxed his due proportion, is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results."

It must be conceded that the taxation of the property of the cor-

poration and also of the stock bears no resemblance to taxing the same tract of land twice to the same person, nor once to A, and again to B. That would be a double taxation, which we suppose would not be allowable in any State in the Union. It would be a direct discrimination and inequality in the exercise of the taxing power, which would impose a greater burden upon one citizen than upon another upon the same kind of property. But the case at bar is quite different. The corporation is a person distinct from the stockholder. It is true, it is what is denominated an artificial person, and may be said to be ideal and intangible. But that it is a person in law is the first principle learned by the student in opening any book on corporations. Its stockholders are distinct and different persons. They are usually not liable for its debts, and have no right to the enjoyment or possession of its property during the period of its duration or until it be dissolved by some procedure known to the law. The stockholder is entitled to dividends upon his stock, if there be any dividends, and the value of his stock depends upon prospective dividends, and the dividends depend upon the net earnings of the corporation. If the bridge in this case be taxed, the tax must be paid from the income, and this reduces the value of the stock, so that there is no duplicate taxation, so far at least as the tax upon the bridge reduces the value of the stock.

In *McGregor's Exec'rs* v. *Vanpel, supra*, this court held that a mortgage given to secure the payment of the purchase-money of the premises mortgaged is not exempt from taxation. In that case it is said that "a system of assessments operating with entire equality and with absolute justice is a desideratum in government yet unattained, and perhaps unattainable." And in *Finley* v. *Philadelphia*, 32 Pa. St., 381, it is said: "There is nothing poetical about tax laws, whenever they find property they claim contribution for its protection without any special respect to the owner or his occupation."

The best devised system of taxation based upon the values of property must, of necessity, produce unequal results, so long as the attempt is made to tax all property including real estate, personal chattels, and moneys and credits. One person will be taxed upon the real estate bought upon credit, and another upon the obligation which he holds for the purchase-money. And this must necessarily be so or there would be but little taxation upon credits, because, for the most part, they are either the representative of money or property of some kind held by another. If as is said in Cooley on Taxation, p. 100, "all the property in a town is sold on credit and the property is taxed to the purchasers, and the debts to sellers, it is manifest that the town taxes twice as much wealth as lies within its borders." And yet under the system of taxation adopted by the State of Iowa, it cannot be claimed that the assessor must inquire of the owner of promissory notes, or mortgages, whether they are credits for taxable property which has been sold by the holder of these credits.

In the case at bar the stockholders paid to the corporation a certain

sum of money. The corporation used this money in the construction of a toll-bridge from which the corporation derived an income. The agreement between the contracting parties is that the corporation is to manage and control the bridge, make the necessary repairs, and pay the taxes assessed against the bridge, and after deducting these legitimate and necessary expenses pay to the stockholder his proportionate share of the net earnings, and upon the dissolution of the corporation the stockholder is to be repaid his money advanced from the property belonging to the dead corporation. Now, suppose this very contract were made with a natural person instead of a corporation, and the stockholder or creditor should make a claim that the obligation held by him was not taxable. There would be no more grounds for such claim under our system of taxation than there would be for the claim that if A loans B $100, which is invested in merchandise, the debt is not taxable because the merchandise is taxable.

These illustrations, it appears to us, demonstrate that if we were to determine that the legislature has no constitutional power to impose this tax upon the stockholder, it would open a door into a sea of trouble in the administration of the revenue laws of the State.

In disposing of this important question we have not reviewed the authorities cited by the respective counsel of the parties. It is sufficient to say that these views are supported by the very great majority of adjudged cases upon this subject. We think the Circuit Court correctly determined that the shares of stock are taxable. And if the public interests of this State require that either the property of a corporation of this character, or the stock therein be exempt from taxation, that relief must come from the law-making power. It will be understood that the decision in this case will have no application to capital stock in manufacturing companies. By chapter 57 of the laws of 1880 such stock is exempt from assessment and taxation.

Affirmed.

[Adams, J., delivered an opinion, concurring in the result but not upon the foregoing grounds.]

VAN ALLEN *v.* THE ASSESSORS.

1865. 3 *Wallace U. S.* 573.[1]

Error to the New York Court of Appeals.

This was a suit involving the question of right, on the part of States, to tax shares in the national banking associations created under the act of Congress of June 3, 1864 (amending the act of Feb. 25, 1863). By the U. S. Laws, at least one third of the capital is required to be invested in interest-bearing bonds of the United States. The capital

[1] Statement abridged. Only portions of the opinions are given. — Ed.

B. The Body of the Association.

(1) *The Organization of the Association.*

CASES ON PARTNERSHIP

CHAPTER I.

THE CREATION OF A PARTNERSHIP.

GRACE *v.* SMITH.

IN THE KING'S BENCH, EASTER TERM, 1775.

[*Reported in* 2 *William Blackstone*, 998.]

ASSUMPSIT for goods sold and delivered. On trial at the sittings after last term, verdict for the defendant; and now *Davy* moved for a new trial, the verdict, as he said, being contrary to law and evidence.

DE GREY, C. J., reported that this was an action brought against Smith alone as a secret partner with one Robinson (*vide* Abbot and Smith[1]), to whom the goods were delivered, and who became bankrupt in 1770. That on the 30th of March, 1767, Smith and Robinson entered into partnership for seven years, but in the November afterwards, some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled, but the dissolution was open and notorious, and was notified to the public on the 17th of November, 1767. The terms of the dissolution were, that all the stock in trade and debts due to the partnership should be carried to the account of Robinson only; that Smith was to have back £5,200 which he brought into the trade, and £1,000 for the profits then accrued since the commencement of the partnership; that Smith was to lend Robinson £4,000, part of this £5,200, or let it remain in his hands for seven years, at five per cent interest, and an annuity of £300 per annum for the same seven years. For all which Robinson gave bond to Smith. In June, 1768, Robinson advanced to Smith £600 for two years' payment of the annuity and other sums by way of interest and gratuities, and other large sums at different times, to enable him to pay the partnership debts, Smith having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of Robinson. That on the 1st of August, 1768, the demands of Smith were all liquidated and

[1] 2 W. Bl. 947.

consolidated into one, — viz., £5,200 due to him on the dissolution of the partnership; £1,500 for the remaining five years of the annuity, and £300 for Smith's share of a ship: in all, £7,000, for which Robinson gave a bond to Smith. That on the 22d of August, 1769, an assignment was made of all Robinson's effects to secure the balance then due to Smith, which was stated to be £10,000. Soon after the commission was awarded.

Davy, for the plaintiff, insisted that the agreement between Robinson and Smith was either a secret continuance of the old partnership or a secret commencement of a new one, being for the retiring partner to leave his money in the visible partner's hands, in order to carry on his trade, and to receive for it twelve and a half per cent profit, which could not be fairly done, unless it be understood to arise from the profits of the trade; and that he ought therefore to be considered as a secret partner. And he relied much on a case of Bloxham and Fourdrinier against Pell and Brooke, tried at the same sittings (7th of March, 1775), before Lord Mansfield in the King's Bench, as in point. "This was also a partnership for seven years between Brooke and Pell; but at the end of one year agreed to be dissolved, but no express dissolution was had. The agreement recited that Brooke being desirous to have the profits of the trade to himself, and Pell being desirous to relinquish his right to the trade and profits, it was agreed that Brooke should give Pell a bond for £2,485, which Pell had brought into the trade, with interest at five per cent, which was accordingly done. And it was further agreed that Brooke should pay to Pell £200 per annum for six years, if Brooke so long lived, as in lieu of the profits of the trade; and Brooke covenants that Pell should have free liberty to inspect his books. Brooke became a bankrupt before anything was paid to Pell. And this action being brought for a debt incurred by Brooke in the course of trade, Lord Mansfield held that Pell was a secret partner. This was a device to make more than legal interest of money, and if it was not a partnership, it was a crime. And it shall not lie in the defendant Pell's mouth to say, 'It is usury, and not a partnership.'"

Grose and *Adair*, for the defendant, argued that the present case is very distinguishable from that of Bloxham and Pell. Pell was to be paid out of the profits of the trade, as appears from the covenant to inspect the books, which else would be useless. His annuity was expressly given as and in lieu of those profits. It was contingent in another view, as it depended on the life of Brooke, by whom those profits were to be made. In our case the annuity is certain, not casual: it does not depend on carrying on the trade, nor to cease when that is left off, but is due out of the estate of Robinson. It is not a necessary dilemma, but it must be either usury or partnership. It may be,

and probably was, a premium for the good-will of the trade. Two thousand guineas is no uncommon price for turning over the profits of a trade so beneficial that it appears to have been rated at £1,000 to each partner in the space of less than eight months. And whether that sum is agreed to be paid at once, or by seven instalments, it is the same thing. Besides, whether there be or be not a secret constructive partnership is a question proper for a jury, who have decided it on consideration of all the circumstances.

DE GREY, C. J. The only question is, what constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits: he relies on them for repayment. And there is no difference whether that money be lent *de novo* or left behind in trade by one of the partners who retires. And whether the terms of that loan be kind or harsh, makes also no manner of difference. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment: a distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits; and I think there is no foundation for granting a new trial.

GOULD, J., same opinion.

BLACKSTONE, J., same opinion. I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a loan (whether usurious or not is not material to the present question), in the latter a partnership. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in the trade, to any amount.

NARES, J., same opinion. *Rule discharged.*[1]

[1] See *Ex parte* Langdale, 18 Ves. 300. — ED.

SMITH v. WRIGHT.

In the Court of Appeals, New York, December, 1854.

[*Reported in 4 Abbott's Appeals*, 274.]

Israel Smith sued Jacob Wright and Theron Losee, and Austin W. and William H. Otis, and Oliver Glover, in the New York Superior Court, for breach of contract.

The complaints alleged that the defendants Wright and Losee, then composing the firm of Wright & Losee, and the defendants the Otises and Glover, composing the firm of A. W. Otis & Co., mutually agreed to make contracts, in the names of their respective firms, with divers persons, for the sale and delivery of flour and other produce, at a future day, with a view to realize the rise or increase in the prices of produce, which they then anticipated would take place in the market, and upon the express agreement that such contracts should be made for the joint account and benefit of said two firms, and that the profits resulting therefrom should be equally divided between them, and the losses, if any, should be borne by the said two firms in equal proportions. It did not appear that this agreement was in writing.

The complaint then alleged that, in pursuance of this agreement, the firm of Otis & Co., for the joint benefit and account of the two firms, entered into a contract in writing with the firm of Collomb & Iselin, which contract was set forth at length. It was signed "A. W. Otis & Co."

The complaint then alleged that Otis & Co. did not deliver the flour, or any part thereof, although requested so to do by E. & W. Herrick, who held the contract when the flour was deliverable, and although said E. & W. Herrick were ready and willing to accept the same, and to pay for the same at the rate or price aforesaid, but defendants wholly neglected and refused to deliver any part thereof.

The contract and cause of action was subsequently assigned to plaintiff, who brought this action.

The defendants Wright & Losee demurred that the contract, being signed by Otis & Co., was not sufficient to charge Wright & Losee; and that it did not appear that any demand of the flour or tender of the price had been made.

The Superior Court held that the arrangement of the two firms was not a partnership between them; and that if it were, the signature of one of the firms to the contract on which the action was brought would not avail to bind the other firm, unless it be alleged that the parties had agreed that the signature of one firm should bind the other. They

therefore sustained the demurrer. Reported in 5 Sandf. 113. The plaintiff appealed.

J. H. Rodman, for plaintiff, appellant.

B. W. Bonney, for defendants, respondents.[1]

EDWARDS, J. [After stating facts.] The first question which is presented is, whether the agreement which is set forth in the complaint created a partnership.

The well-established rule is, that if a person partakes of the profits of any branch of trade or business, he is answerable as a partner for the losses. The reason of this is, that if he takes a part of the profits, he takes from the creditors a part of the fund which is the proper security for the payment of their debts. Grace *v.* Smith; Dobb *v.* Halsey.[2] The only qualification of this rule which has ever been acknowledged is, that when a person stipulates to receive a sum of money in proportion to a given quantity of the profits, as a reward for his services, he is not chargeable as a partner. Story on Part. 32, 33, 34, 45, and authorities cited in note; Cary, §§ 9, 10, 11; Gow, 14, 19; Collyer, 14, 15 *et seq.* And the propriety of even this qualification was doubted by Lord Eldon. *Ex parte* Hamper.[3] In the present case, according to the terms of agreement between the defendants, the business was to be carried on for their joint account and benefit, and not only were the profits arising therefrom to be shared between them, but the losses were also to be borne by them in equal proportions. There is nothing in the agreement which in the least degree indicates that the shares of any of the parties were to be received as compensation for services rendered. In the case of Champion *v.* Bostwick, it was shown that three persons ran a line of stage-coaches from Utica to Rochester, the route being divided between them into three sections, the occupant of each section furnishing his own carriages, horses, and drivers, and paying the expenses of his own section; but the money received as fare of passengers, deducting therefrom only the toll paid at turnpike-gates, was divided amongst the parties in proportion to the number of miles run by each. Upon this state of facts, it was held that they were jointly liable as copartners to a third person, not a passenger, for an injury received through the negligence of the driver of the coach of one of them. In the case of Everitt *v.* Chapman,[4] the parties had agreed that each one should manufacture and sell the portion so manufactured by him, each party to participate in the profits. It was held that all the parties were liable as copartners to a third person, who sold hides to one of the parties, in ignorance of the partnership, and charged the same to him.

[1] The arguments of counsel, containing little more than a citation of authorities, are omitted. — ED.

[2] 16 Johns. 34; 3 Kent, 27. [3] 17 Ves. 401. [4] 6 Conn. 347.

These cases have introduced no new principle, and I have alluded to them merely because they are in many respects similar to the one before us. The fact that the agreement in question was made between two firms already in existence can make no difference as to the liability of the parties, for, as far as the agreement is concerned, the two firms stand upon the same footing as two individuals would. Neither can it make any difference that the contract which is now sought to be enforced as the joint contract of the parties was made in the partnership name of one of the firms, for the partnership agreement between the defendants authorized such a contract. Wright *v.* Hooker;[1] Everitt *v.* Chapman. The court below, in giving their opinion, say that "the ground upon which a participation in the profits of a trade is held to make parties liable to third persons, though they never intended to be partners between themselves, as it was advanced by De Grey, C. J., in Grace *v.* Smith, and was adopted in Dob *v.* Halsey, is entirely wanting in this case. Here Wright & Losee could not take any of the fund on which the creditors of Otis & Co. relied for payment."

If the court mean that Wright & Losee could not take any of the fund which constituted the capital stock employed in the separate business of Otis & Co., or the profits arising therefrom, or that Wright & Losee could not take any of the fund employed in their joint business, except so far as it constituted the profits arising from such business, the remark is correct, although it is not apparent how that can have any bearing upon the question before us. But if the court mean that the interest which Wright & Losee had in the profits of that business which was carried on under the agreement with Otis & Co. did not give them a right to take any part of the fund upon which the creditors in respect to such business relied, the remark is founded upon an entire misconception of the general rule, and of the decision referred to; for De Grey, C. J., expressly says that, "if any one takes part of the profits, he takes a part of that on which the creditor relies for payment." All the interest which is necessary to constitute a partnership is an interest in the profits, and such an interest necessarily constitutes a partnership, unless, as has been stated, the interest in the profits is given as a compensation for services. The error into which the court below have fallen is in confounding a community of interest in the property out of which the profits are to arise with a community of interest in the profits themselves. The latter is all that has ever been considered necessary to create a partnership as against a third person. Whether the defendants were partners as between themselves, it is not necessary to inquire.[2] They were so in reference to third

[1] 10 N. Y. 51.

[2] In 1 Lindley Part. (4th ed.) 18, the learned author says: "Whatever difference of opinion there may be as to other matters, it admits of no doubt whatever that persons

persons, and the court below erred in coming to a different conclusion.[1]

But, although there is sufficient allegation of a copartnership, still, I think that the complaint is defective in not alleging a performance, or, what is regarded as equivalent, an offer or a tender of performance, on the part of the plaintiff, or those through whom he claims. The contract in suit was for the sale of flour, at a price agreed upon. The payment of the price was the consideration for the delivery. The payment and the delivery were to be concurrent acts, and, as was recently held by this court in the case of Lester v. Jewett,[2] neither party is entitled to recover from the other without alleging an offer or tender of performance on his part. I think that, for the reason last stated, the complaint is defective, and that the judgment should be affirmed.

engaged in any trade, business, or adventure upon the terms of sharing the profits *and* losses arising therefrom, are partners in that trade, business, or adventure."

But this statement, it is conceived, is much too sweeping. An agreement to share profits and losses creates a strong but not conclusive presumption of a partnership between the parties, as appears from the following authorities: Moore v. Davis, *supra*, pp. 105, 107 (*semble*); Stevens v. Faucet, 24 Ill. 483; Chaffraix v. Price, 29 La. An. 176; Dwinel v. Stone, 30 Me. 384 (*semble*); Howe v. Howe, 99 Mass. 71 (*semble*); Donnell v. Harshe, 67 Mo. 170; Musser v. Brink, 68 Mo. 242 (*semble*); Osbrey v. Reimer, 49 Barb. 265; and cases cited in note, *infra*. But see Scott v. Campbell, 30 Ala. 728; Getchell v. Foster, 106 Mass. 42 (*semble*), *contra*. — Ed.

[1] But see Marsh v. Northwestern Co., 3 Biss. 351; Fawcett v. Osborne, 32 Ill. 411 (and see Stevens v. Faucet, 24 Ill. 483); Snell v. DeLand, 43 Ill. 323 (*semble*); Chaffraix v. Price, 29 La. An. 176; Chaffraix v. Lafitte, 30 La. An. 631; Fay v. Davidson, 13 Minn. 523 (but see Connolly v. Davidson, 15 Minn. 519); Chapline v. Conant, 3 W. Va. 507, — in all of which cases it was held that A. was not liable as a partner with B. to third persons, although he was to share profits and losses with B., *contra*.

In Noakes v. Barlow, Blackburn, C. J., said, p. 139: "If the question in this case had depended on the simple question whether sharing in profits and losses constituted a partnership so as to authorize one party to pledge the other's credit, I should have thought the direction right; as, since the decision in Cox v. Hickman, it has been the law that sharing in profits and losses does not in itself constitute a partnership, but only affords a strong presumption that the one party is made the agent for the other." See also Kilshaw v. Jukes, *supra*, p. 62. — Ed.

[2] 11 N. Y. (1 Kern.) 453.

CHAPTER II.

QUASI OR NOMINAL PARTNERS.

DE BERKOM v. SMITH AND LEWIS.

AT NISI PRIUS, CORAM LORD KENYON, C. J., JUNE 26, 1793.

[*Reported in* 1 *Espinasse*, 29.]

ASSUMPSIT to recover the value of a quantity of foreign lace against the defendants, charging them as partners.

It was admitted that Smith, one of the defendants, was liable; but the other defendant, Lewis, denied that he was a partner. This was the only question in the case.

The evidence on the part of the plaintiff was, that he was a foreigner, living at Lisle in Flanders; that, having been applied to by the defendants for a quantity of lace on credit; that, before he would furnish it, he wrote over to his correspondent in London to inquire concerning their circumstances and situation; that his correspondent had inquired from a Mr. Botham, a merchant in London, who informed him that they were in partnership in trade, which information the correspondent communicated to the plaintiff, who, in consequence thereof, gave them the goods on the terms they asked.

Mr. Botham's clerk was called, and proved that the only connection in trade between Mr. Botham and the defendants was in discounting bills, which Mr. Botham had been in the habit of doing for Smith, one of the defendants, but that, on discounting a bill at one time for Smith, that he had introduced Lewis to him as his partner.

LORD KENYON, upon this evidence, ruled that it was not sufficient to charge Lewis as a partner. His Lordship said that persons might be partners in a particular concern or business; but that notwithstanding, if they did not appear to the world as partners, that it should not be sufficient to constitute a general partnership, and make them liable in other cases not connected with such particular business. That the circumstance in evidence of the introduction of Lewis to Mr. Botham should be taken *secundum subjectam materiam;* that is, as applying to the transaction in which Smith was concerned with Mr. Botham, — the discounting of bills, — to which transaction only it should be confined, and that he was therefore of opinion that, without further evidence, a

general partnership could not be established, in order to charge Lewis, the other defendant, in this action.

It afterwards, however, appearing in evidence that in fact Lewis had represented himself to the plaintiff as partner in trade with Smith, his Lordship in his charge to the jury added that, though in point of fact parties are not partners in trade, yet, if one so represents himself, and by that means gets credit for goods for the other, that both shall be liable. *The plaintiff recovered.*

Erskine and *W. Best*, for the plaintiffs.

Bower, for the defendants.

[1] *Ex parte* Broome, 1 Rose, 69; *Ex parte* Watson, 19 Ves. 461 (*semble*); *Ex parte* Matthews, 3 V. & B. 125 (*semble*); Shott *v.* Strealfield, 1 M. & Rob. 8; Fox *v.* Clifton, 6 Bing. 776 (*semble*); Baird *v.* Planque, 1 F. & F. 344; Kirkwood *v.* Cheetham, 2 F. & F. 798; Gurney *v.* Evans, 3 H. & N. 122; Martyn *v.* Gray, 14 C. B. N. S. 824; Doubleday *v.* Muskett, 7 Bing. 110; Lake *v.* Argyll, 6 Q. B. 477 (conf. Wood *v.* Argyll, 6 M. & G. 928); Collingwood *v.* Berkeley, 15 C. B. N. S. 145; Maddick *v.* Marshall, 16 C. B. N. S. 387; 17 id. 829, S. C.; Buckingham *v.* Burgess, 3 McL. 364; *In re* Jewett, 15 N. B. R. 126; *Re* Krueger, 2 Low. 66; Brugman *v.* McGuire, 32 Ark. 733; Bowie *v.* Maddox, 29 Ga. 285; Carmichael *v.* Greer, 55 Ga. 116; Fisher *v.* Bowles, 20 Ill. 396; Dailey *v.* Coons, 64 Ind. 545; Sherrod *v.* Langdon, 21 Iowa, 518; Walrath *v.* Viley, 2 Bush, 478; Lee *v.* Bullard, 3 La. An. 462; Grieff *v.* Boudousquie, 18 La. An. 631; Potter *v.* Greene, 9 Gray, 309 (*semble*); Mershon *v.* Hobensack, 2 Zab. 372; Burns *v.* Rowland, 40 Barb. 368; Conklin *v.* Barton, 43 Barb. 435; Vibbard *v.* Roderick, 51 Barb. 616; Stiles *v.* Meyer, 64 Barb. 77; McStea *v.* Matthews, 50 N. Y. 166; Moss *v.* Jerome, 10 Bosw. 220; Speer *v.* Bishop, 24 Ohio St. 598; Drennen *v.* House, 41 Pa. 30; Craig *v.* Warner, 3 Phila. 298; Furber *v.* Carter, 11 Humph. 271; Crozier *v.* Kirker, 4 Tex. 252; Stearns *v.* Haven, 14 Vt. 540; Mathews *v.* Felch, 25 Vt. 536; Wait *v.* Brewster, 31 Vt. 516, *accord.*

In *Re* Krueger, *supra*, Speer *v.* Bishop, *supra*, Wait *v.* Brewster, *supra*, the holding out consisted in the authorized use of the name of a retired partner under the old firm style. But the retired partner will not be chargeable as a nominal member of the new firm, if he has not authorized the continued use of his name. Newsome *v.* Coles, 2 Camp. 617. The evidence of authority in Williams *v.* Keats, 2 Stark. 290, would seem to be insufficient to warrant the verdict there given. See observations upon that case in 1 Lindley, Part. (4th ed.) 410. See also Webster *v.* Webster, 3 Swanst. 490, n.; Devaynes *v.* Noble, 1 Mer. 616; Vulliamy *v.* Noble, 3 Mer. 614.

But one who holds himself out as a partner can be charged as such only by those who knew and acted upon the faith of the false representations. Vice *v.* Anson, 7 B. & C. 409; Dickenson *v.* Valpy, 10 B. & C. 128, 140; Pott *v.* Eyton, 3 C. B. 32; Edmundson *v.* Thompson, 31 L. J. Ex. 207; Benedict *v.* Davis, 2 McL. 347; Bowie *v.* Maddox, 29 Ga. 285; Markham *v.* Jones, 7 B. Mon. 456; Wood *v.* Pennell, 51 Me. 52; Irvin *v.* Conklin, 36 Barb. 64.

An estoppel being founded upon a representation of an existing state of facts, a statement of intention to become a partner cannot render one liable as a nominal partner. Bourne *v.* Freeth, 9 B. & C. 632; Reynell *v.* Lewis, 15 M. & W. 517. — Ed.

WILLIAM POILLON AND OTHERS, RESPONDENTS, v. CHARLES F. SECOR, APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, JANUARY, 1865.

[*Reported in* 61 *New York Reports*, 456.]

DWIGHT, C.[1] This case presents the question whether, if a person makes an agreement with two members of a firm, for a valuable consideration, to allow his "name to be used in firm signatures, signs, advertisements, bill-heads, and for all and every the business purposes of the firm, so long as it remains in existence," thereby becomes a partner as to third persons who may have sold goods to the firm on credit, and who may not have known at the time of the sale what person was represented by the fictitious name.

The title assumed under this agreement was Secor, Swan, & Co. There had been a Mr. William H. Secor, who had previously been a member of this firm when some goods were sold by the plaintiffs. When he left, the arrangement was made with Charles F. Secor to continue the business, making use of his name. After this arrangement, the goods which are the subject of the present action were sold. The referee who tried the cause found that the plaintiffs did not sell or deliver the goods upon the faith or credit or reputation that Charles F. Secor, the defendant, was one of the members of the firm or liable for its debts, and that he had no knowledge of the agreement until after the goods had been delivered. Under this state of facts, can it be claimed that Charles F. Secor is liable to the plaintiffs for the goods sold after the date of his agreement?

This point cannot be regarded as settled by the authorities, and can only be satisfactorily disposed of by discussing it upon principle. It is claimed, on behalf of the defendant, that the true ground on which a mere nominal partner is to be held liable to creditors of the firm is that of an estoppel *in pais;* and that it is a necessary element in such a case that a creditor of the firm should have parted with his goods, or have given it credit on the faith of the representations made by the nominal partner. It is cheerfully conceded that this rule is, in some instances, applicable. The real inquiry is, whether it must be extended to all cases. There are cases in which the doctrine of estoppel may be rested on broad grounds of public policy: the present appears to be one of them. 1 Greenl. Ev. § 210. The sound rule would seem to be, that a person who deliberately agrees that his name shall be used in a partnership must be conclusively presumed to intend the consequences which naturally flow from such an act. It would be contrary to public

[1] See *supra*, p. 24, note 1. — ED.

convenience to require affirmative proof that dealers with the firm knew who was represented by the fictitious name. The referee, in the present case, did not find that the plaintiffs knew affirmatively that Charles F. Secor was not a member of the firm, but only that he did not know of the arrangement between the parties defendant, and did not act on the credit of his name. If this finding was sufficient to defeat the plaintiff's claim, a heavy burden would be thrown upon dealers with the firm. Suppose that one of them should die, and his executor should prosecute his claim, should he be defeated because he could not prove directly that his testator knew what person was represented by the fictitious name?

In *Young* v. *Axtell*,[1] Lord Mansfield said that the defendant, Mrs. Axtell, as she suffered her name to be used and held herself out as a partner, was certainly liable, though the plaintiff did not at the time know that she was a partner or that her name was used. This case is approved by Mr. Lindley, in his work on Partnership. He says: "It appears, from this case, that it is not necessary for a person charging a nominal partner to have been aware of the partnership at the time of the contract. And this doctrine seems satisfactory when we consider that the object of the rule is to prevent the extension of unsound credit." Sect. 86. This is a clear recognition of the element of public policy underlying the rule of Lord Mansfield.

This view is strengthened by the policy of our own statute against fictitious names, the use of them being made a crime. No more effectual mode of breaking up a pernicious practice upon this subject can be suggested than for the courts to hold uniformly that parties allowing their names to be used as partners shall be held to all the consequences fairly attributable to their acts, and to make them partners as to third persons dealing with the firm, without reference to their knowledge of the real facts in the case. Suppose that Swan, the other ostensible partner in this case, had also been a fiction, and that the only real dealer was West, represented by the letters "Co.," could it be tolerated that the men whose names appeared should escape all responsibility, because a creditor could not show affirmatively, to the satisfaction of a referee or jury, that he reposed credit in the particular Mr. Secor or Swan who had thus held himself out to the public?

It should be added that the only mode of giving true effect to Charles F. Secor's agreement is to hold him responsible. The firm must have expected some practical result from the use of his name. They paid him a consideration for it. They must have understood that they were to gain an advantage from it. On the theory now advanced, nothing was to be accomplished. To those who did not know of Charles F. Secor's connection with the firm, he was not liable. To those who did know of

[1] Cited in 2 H. Bl. 242; *supra*, p. 12.

his agreement, the same rule would have to be applied, as on account of knowledge there could be no estoppel. The only persons who could, under any circumstances, hold him liable would be those who were aware of his being in some way connected with the firm, but did not know of the agreement under which he acted. To make the agreement of any advantage to dealers with the firm, its true nature must be studiously concealed from the parties intended to be affected by it. Such an exposition of the agreement is so plainly subversive of the policy of the law that it would not be fair to the parties to assume that they intended it. The reasonable construction of their agreement, in the absence of countervailing proof, is, that they intended it to be open and known to the public, and to have it accomplish its apparent purpose by pledging Mr. Secor's credit to their dealers. This construction makes the agreement accomplish its proper purpose, as it renders Mr. Secor responsible to every person dealing with the firm precisely as though he were an actual partner.

On the whole, we approve of the rule on this subject as it is laid down by Mr. Parsons, in his work on Partnership. He says: "When a creditor sues a firm, and seeks to put the liability of a partner upon one who is only a nominal partner, it is a somewhat difficult question whether the plaintiff can recover without proof that he himself believed the person whom he seeks to charge to be a partner. The authorities on this question are far from unanimous, some holding that one put forth to the world as a partner is liable as such to every creditor of the firm; while others hold that he is thus liable only because he was a partner in fact and in interest, or because the plaintiff regarded him as one, and dealt with the firm in some degree, at least, on his credit. Perhaps a reasonable rule might be stated thus: Where one is held forth to the world as a partner, the first question is, was he so held out by his own authority, assent, or connivance, or by his negligence? If by his authority, consent, or connivance, the presumption is absolute that he was so held out to every creditor or customer. If so held out by his own negligence only, he should be held only to a creditor who had been actually misled thereby." Page 119.

There was no error in the disposition of this cause in the court below, and the judgment should be affirmed.

All concur.

Order affirmed, and judgment accordingly.

CHAPTER III.

CREATION OF CORPORATION.

SECTION I.

By what Authority, and in what Method.

FRANKLIN BRIDGE CO. *v.* WOOD.

1853. 14 *Georgia*, 80.

ASSUMPSIT in Heard Superior Court. Tried before Judge HILL, Term, 1853.

The Franklin Bridge Company was incorporated under the Act of the Legislature of 1843, to prescribe the mode of incorporating companies for certain purposes, by an order of the Inferior Court of Heard County,

The company sued the defendant, Wood, for his subscription to their stock.

The defendant pleaded that the company was not legally incorporated; contending that the act of the Legislature, referred to, was unconstitutional and void.

Upon argument, the court held that the act aforesaid was unconstitutional, and nonsuited the plaintiffs.

To this decision plaintiff excepted.

Mabry, for plaintiff in error.

Featherston, for defendant.

By the Court, LUMPKIN, J., delivering the opinion:—

Is the Act of 1843 and that of 1845, amendatory thereof, pointing out the manner of creating certain corporations and defining their rights, privileges, and liabilities, unconstitutional?

By the first section of the Act of 1843, it is provided "That when the persons interested shall desire to have any church, camp-ground, manufacturing company, trading company, ice company, fire company, theatre company, or hotel company, bridge company, and ferry company, incorporated, they shall petition in writing the Superior or Inferior Court of the county where such association may have been formed, or may desire to transact business for that purpose, setting forth the

object of their association, and the privilege they desire to exercise, together with the name and style by which they desire to be incorporated; and said court *shall pass a rule or order,* directing said petition to be entered of record on the minutes of said court."

Section 2 enacts "That when such rule or order is passed, and said petition is entered of record, the said companies or associations shall have power respectively, under and by the name designated in their petition, to have and use a common seal; to contract and be contracted with; to sue and be sued; to answer and be answered unto in any court of law or equity; to appoint such officers as they may deem necessary; and to make such rules and regulations as they may think proper for their own government; not contrary to the laws of this State; but shall make no contracts or purchase or hold any property of any kind, except such as may be absolutely necessary to carry into effect the object of their incorporation. Nothing herein contained shall be so construed as to confer banking or insurance privileges on any company or association herein enumerated; and the individual members of such manufacturing, trading, theatre, ice, and hotel companies, shall be bound for the punctual payment of all the contracts of said companies, as in case of partnership."

The third section declares that "No company or association shall be incorporated under this act, for a longer period than fourteen years; but the same may be renewed whenever necessary, according to the provisions of the first section of this act."

The fourth section confers upon the Superior and Inferior Courts respectively, the power to change the names of individuals.

Section fifth. "For entering any of said petitions and orders, and furnishing a certified copy thereof, the clerk shall be entitled to a fee of five dollars; except in cases of applications by individuals for the change of names, — in which case, the clerk of said court shall be entitled to the fee of one dollar. And that such certified copy shall be evidence of the matters therein stated in any court of law and equity in this State." Cobb's Digest, 542, 543.

By the Act of 1845 the provisions of the Act of 1843 are extended to all associations and companies whatever, except banks and insurance companies; and the individual members of all such incorporations are made personally liable for all the contracts of said associations or companies. Ibid.

The argument against the validity of the charter of the Franklin Bridge Company, created under these statutes, is this: —

1. That in England, corporations are created and exist by prescription, by Royal Charter, and by Act of Parliament. With us they are created by authority of the Legislature, *and not otherwise.* That to establish a corporation is to enact a law; and that no power but the legislative body can do this.

2. That legislative power is vested under our Constitution, in the General Assembly, to consist of a Senate and House of Representa-

tives, to be elected at stated periods by the citizens of the respective counties.

3. And that the General Assembly is bound to exercise the power of making laws thus conferred upon them by the people in the primordial compact, in the mode therein prescribed, and in none other; and that a law made in any other mode is unconstitutional and void. That the Legislature is but the agent of their constituents; and that they cannot transfer authority delegated to them to any other body, corporate or otherwise, — not even to the Judiciary, a co-ordinate department of the government, unless expressly empowered by the Constitution to do so. That to do this would be to violate one of the fundamental maxims of jurisprudence as well as of political science, namely, *delegata potestas non potest delegari.* That to do this would not only be to disregard the constitutional inhibition which is binding upon the representative, but by shifting responsibility introduce innovations upon our system, which would result in the overthrow and ultimate destruction of our political fabric.

The constitutional inquiry thus presented is an exceedingly grave one. It reaches far beyond the case made in the bill of exceptions, and extends to the whole range of topics which fall under legislative cognizance. In the view we take however of the statutes before us, no such proposition as that which has been discussed is presented for our adjudication. And we rejoice that it is so, not only on account of the delicacy of the task, in pronouncing an act of Legislature unconstitutional and void, — one which is never justifiable unless the case is clear and free from doubt; and even then one might almost be forgiven for shrinking from the performance of a duty which would be productive of such incalculable mischief and confusion. Bridges have been built at a heavy expense; manufacturing and innumerable other associations have been formed in Georgia, and are in full operation, under charters incorporated under this law. And in view of the consequences any court might hesitate, unless the repugnance between the statute and the Constitution was so palpable as to admit of no doubt, and produce a settled conviction of their incompatibility with each other.

4. It was formerly asserted that in England the act of incorporation must be the *immediate* act of the king himself, and that he could not grant a license to another to create a corporation. 10 Reports, 27. But Messrs. Angell and Ames, in their Treatise on Corporations, state that the law has since been settled to the contrary; and that the king may not only grant a license to a subject to erect a particular corporation, but give a general power by charter to erect corporations indefinitely, on the principle that *qui facit per alium facit per se;* that the persons to whom the power is delegated of establishing corporations, are only an instrument in the hands of the government. 1 Kyd, 50; 1 Black. Com.; Ang. & Am. 63.

Before the revolution, charters of incorporation were granted by the

proprietaries of Pennsylvania under a derivative authority from the Crown; and those charters have since been recognized as valid. 3 Wilson's Lectures, 409. A similar power has been delegated by the Legislature of Pennsylvania with regard to churches. 7 S. & R. 517. The acts of the instrument in these cases become the acts of the mover, under the familiar maxim above mentioned. See also 1 Missouri R. 5.

5. Our opinion is that no legislative power is delegated to the courts by the acts under consideration. There is simply a ministerial act to be performed, — no discretion is given to the courts. The duty of passing the rule or order directing the petition of the corporators to be entered of record on the minutes of the court, setting forth to the public the object of the association and the privilege they desire to exercise, together with the name and style by which they are to be called and known, is made *obligatory* upon the courts; and should they refuse to discharge it, a mandamus would lie to coerce them. It is true the Legislature has seen fit to use the courts for the purpose of giving legal form to these companies. But it might have been done in any other way. Under the Free Banking Law of 1838, instead of petitioning the court, and having the order passed and entered upon its minutes, the certificate specifying the name of the association, its place of doing business, the amount of its capital stock, the names and residence of the shareholders, and the time for which the company was organized, is required merely to be proven and acknowledged, and recorded in the office of the clerk of the Superior Court, where any office of the association is established, and a copy filed with the Comptroller General. Cobb's Digest, 107, 108.

And so under the Act of 1847, authorizing the citizens of this State, and such others as they may associate with them, to prosecute the business of manufacturing with corporate powers and privileges. The persons who propose to embark in that branch of business are required to draw up a declaration specifying the objects of their association and the particular branch of business they intend carrying on, together with the name by which they will be known as a corporation, and the amount of capital to be employed by them; which declaration is required to be first recorded in the clerk's office of the Superior Court of the county where such corporation is located, and published once a week for two months in the two nearest Gazettes; which being done, it is declared that said association shall become a body corporate and politic, and known as such, without being specially pleaded, in all courts of law and equity in this State, to be governed by the provisions and be subject to the liabilities therein specified. Cobb's Digest, 439, 440.

In these two instances, and others which might be cited, the Legislature have dispensed with the action of the courts, or of any other agency, to carry out their enactments with regard to these various associations which have become the usual and favorite mode of conducting the industrial pursuits of the civilized world in modern times.

All these Statutes were complete as laws when they came from the hands of the Legislature, and did not depend for their force and efficacy upon the action or will of any other power. It is true that they could only take effect upon the happening of some event, such as the filing the petition or declaration, and giving publicity to the purpose of the association in the mode prescribed by the act. But if this were a good reason for regarding these statutes as invalid, then how few corporations could abide the test! For it requires the *acceptance* of the charter to create a corporate body; for the government cannot compel persons to become an incorporated body without their consent. And this consent, either express or implied, is generally subsequent in point of time to the creation of the charter. And yet, no charter that we are aware of has been adjudged invalid, because the law creating it and previously defining its powers, rights, capacities, and liabilities, did not take effect until the acceptance of the corporate body, or at least a majority of them, was signified.

The result therefore of our deliberation upon this case is, that the Acts of 1843 and 1845, vesting in all associations, except for banking and insurance, the power of self-incorporation, do not impugn the Constitution, and that the charter of the Franklin Bridge Company and all others created under them, and in conformity to their provisions, are legal and valid. With the policy of these Statutes we have nothing to do. The province of this and all other courts is *jus dicere*, not *jus dare*. *Judgment reversed.*

Under the common law of England and the United States a corporation cannot be formed, like a partnership, merely by a contract between the individuals composing it. The right of forming a corporation and of acting in a corporate capacity must be treated as a franchise, or special privilege, which may not be assumed without a grant of authority from some governing power.

In England the right of forming a corporation may be granted either by the king alone or by act of Parliament. . . .

In the United States, where written constitutions define the powers of the several branches of the government, the power of chartering corporations belongs to the legislature only. It is a power which belongs to the legislature, unless expressly taken away by the Constitution, and is incidental to the general power of making laws for the welfare of the State.

Congress has power to grant a charter of incorporation whenever this is an appropriate measure for carrying out any of the authorized purposes of the Federal government. . . .

In many of the States the legislature is prohibited by constitutional provision from granting corporate franchises except in accordance with certain prescribed rules. Thus it is provided, in many instances, that no charter of incorporation shall be granted by special act, and

ELLIS *v.* MARSHALL.

1807. 2 *Massachusetts*, 269.[1]

EJECTMENT. The plaintiff claimed under a sale by the "*Front Street Corporation in the town of Boston*," established by a law of the Commonwealth, passed March 6, 1804.[2] By this statute sundry persons, and amongst them the defendant, *Marshall*, described as "being owners and proprietors of the lands and flats over which the said street will pass, and of the lands and flats adjoining thereto," are incorporated for the purpose of making a street in the town of *Boston*. By the third section of the statute, the corporation are authorised to assess upon all the owners and proprietors of said land and flats, according to the proportion they severally hold therein, such sums of money as shall be agreed upon by the said proprietors, or the major part of such of them as shall be assembled at any legal meeting to be called for that purpose; and if any of the said proprietors shall neglect or refuse to pay the sums of money duly assessed upon him therefor, for the space of three months, the proprietors are authorized to sell, at public auction, so much of such delinquents share of said lands and flats as shall be sufficient to pay the sums so assessed, and the charges of sale: and the said proprietors may, by their clerk or committee, execute a good deed to the purchaser in fee simple.

. . . . . .

Marshall was not one of the petitioners for the act of incorporation; never assented to the petition; and never attended a meeting of the corporation.

It was agreed, "that, on the tenth day of October last, the land demanded in this action, being part of the said *Marshall's* estate adjoining said street, was sold at public auction, according to the rules and regulations of the Corporation, and the powers granted in said act, for the purpose of raising the amount of the assessment taxed on him by said Corporation, as being towards his proportionate part of the expence of making said street, which, though often requested, he had refused to pay, and a deed of conveyance thereof was accordingly given by said Corporation to said *Ellis*, to hold the premises demanded, to him in fee simple."

"If on the foregoing facts the court should be of opinion that the said Corporation could, by virtue of the said act, legally assess the said *Marshall*, and sell his lands for non-payment thereof, then it was agreed that the defendant should be defaulted, and judgment should be rendered for the plaintiff; otherwise the plaintiff was to become nonsuit, and judgment be rendered for the defendant."

Parsons and *Dexter*, for plaintiff.

The Attorney General, *Sullivan*, and *Amory*, for defendant.

[1] Statement abridged. Arguments and part of opinion omitted. — ED.

[2] 3 Mass. Special Laws, 375.

PARKER, J. From the foregoing facts and the arguments thereon by the counsel, it appears that all the proceedings of the corporation relative to the assessment and sale were correct; so that if *Marshall* were, at the time thereof, a member of the corporation, the title to the demanded premises in *Ellis* could not be disputed.

We are therefore necessarily brought to the question, indeed the only one in the case, whether *Marshall*, by virtue of the act aforesaid, became a member of the said corporation, subject to its rules and regulations, and liable to be assessed for the purpose of building said street.

The counsel for the plaintiff have contended

1st. That by virtue of the act itself, *Marshall* being named therein, he became *ipso facto* a member of the corporation, the Legislature having competent power to compel him thereto:

2dly. That should this not be the case, the foregoing facts contain sufficient evidence of his consent, tacit at least, to the passing of said act, and the insertion of his name therein.

The determination of the first point requires that we should ascertain the true nature and character of this legislative proceeding. If it were a public act, predicated upon a view to the general good, the question would be more difficult. If it be a private act, obtained at the solicitation of individuals, for their private emolument, or for the improvement of their estates, it must be construed, as to its effect and operation, like a grant. We are all of opinion that this was a grant or charter to the individuals who prayed for it, and those who should associate with them; and all incorporations to make turnpikes, canals and bridges must be so considered.

Can then one, whose name is by mistake or misrepresentation inserted in such an act, refuse the privileges it confers, and avoid the burthens it imposes? If he cannot, then the Legislature may, at all times, press into the service of such corporations those whose lands may be wanted for such objects, whenever they may be prevailed on to insert the names of such persons, by the intrigue or mistake of those more interested in the success of the object. No apprehension exists in the community that the Legislature has such power. That the land of any person, over or through which a turnpike or canal may pass, may be taken for that purpose, if the Legislature deem it proper, is not doubted. The constitution gives power to do this, provided compensation is made. But it was never before known, that they have power over the person, to make him a member of a corporation, and subject him to taxation, *nolens volens*, for the promotion of a private enterprise.

That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear, to require the support of authorities. That he may decline to improve his land, no one will doubt. Although the Legislature may wisely determine that a certain use of his property will be highly beneficial to him, he has a right to

judge for himself on points of this nature. The fact therefore in the case, that *Marshall* is benefitted equally with the other owners by the making of this street, is of no importance.

. . . . . .

It being then the opinion of the court that this act is of a nature to require the assent of *Marshall*, either express or implied, before it can operate upon him, it is necessary to enquire into the second point, *viz.*, whether the facts agreed on in this case furnish evidence of such assent.

. . . . . .

Upon the whole, therefore, we are of opinion that the act under which the plaintiff sets up his title, could not bind *Marshall* without his assent: that he having uniformly, whenever opportunity occurred, signified his dissent, is not a member of the corporation it created, was not liable to their assessments, and therefore that the sale of his land was without authority of law and is void.

. . . . . .

Plaintiff nonsuit.

STATE *v.* BULL.

1844. 16 *Connecticut*, 179.[1]

INFORMATION in the nature of a *quo warranto*, to test the right to exercise certain corporate franchises.

In 1833, the legislature passed an act to authorize the formation of a corporation to carry on the business of insurance. Among the provisions of the act are the following: the capital is to be $100,000, divided into shares of $20 each; subscriptions to the stock shall be opened under the superintendence of seven commissioners, named in the act, at such times and places as they shall appoint; there shall be paid to the commissioners at the time of subscription $1.00 on each share subscribed; the subscriptions shall continue open three days; in case the subscriptions shall not amount to $100,000, the subscriptions to complete said sum may remain open, or be opened anew, at some subsequent time or times as the commissioners shall determine, and further subscriptions may then be made to complete the amount; after the stock shall have been fully taken up, the subscribers, their successors and assigns, shall be, and are hereby, created a corporation by the name of the Connecticut Life and Fire Insurance Company.

In June, 1833, the commissioners opened subscriptions, giving due notice of the time and place, and the subscriptions were kept open for the time prescribed in the act. The subscriptions amounted to only $15,000. The subscriptions were thereupon closed; and the commissioners then, or soon after, refunded to the subscribers the sum of one dollar which they had paid on each share.

[1] Statement abridged. Arguments and part of opinion omitted. — ED.

Nothing further was attempted to be done under the act, until March 16, 1844, when the commissioners, without giving any public notice, opened subscriptions anew. Three persons then subscribed for the entire capital stock. Thereafter the holders of the shares so last subscribed met, elected directors, claimed to be a corporation, and proposed to engage in the business of insurance.

To the information setting out, in substance, the foregoing facts, there was a general demurrer.

T. C. Perkins, in support of the demurrer.

Hungerford and *Toucey, contra.*

CHURCH, J. The commissioners appointed under this charter, to receive subscriptions to the stock of the proposed Insurance Company, were the agents of the state, empowered to offer an act of incorporation to such as would accept it, upon the terms and conditions proposed.

The legislature was influenced in granting the charter, by what it supposed the public interest, at *that time*, required. We cannot presume, that it was enacting a supernumerary charter, to be laid away among the state records, to await either the convenience or necessity of future times. Nor can we, without great disrespect, suppose it intended to give opportunity for the exercise of favouritism, or to prevent competition in subscriptions.

[The learned Judge then *held*, that public and general notice should have been given whenever the books for subscription were opened anew. The opinion then proceeds.]

The foregoing considerations are decisive of our opinion on this subject. But there are others, which confirm it. The commissioners, who had been appointed, in view of the state of things then existing, performed the duty required of them. They offered the charter for public acceptance; and it was declined. They restored to the subscribers all they had advanced, and abandoned the project. In the meantime, perhaps, other corporations may have been created, to supply the public necessities, which once were supposed to exist; and the legislature have not again spoken on the subject. Under these circumstances, and because this charter was not accepted within a reasonable time, we think the trust conferred upon the commissioners must be considered as having been surrendered; and that it cannot be resumed, now, without a renewed expression of the will of the legislature.

We hold the information to be sufficient.

Demurrer overruled.

SECTION III.

Conditions precedent to Incorporation De Jure. "One Man Company."

PEOPLE v. MONTECITO WATER CO.

1893. 97 *California*, 276.

[In Department Two.[1]] Appeal from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

John J. Boyce, *Richards & Carrier*, and *George H. Gould*, for appellant.

W. C. Stratton, for respondents.

Temple, C. Plaintiff appeals from a judgment entered upon demurrer to complaint. The demurrer was general, and on the ground of insufficiency of the facts: It is a proceeding taken by the attorney general of the state, in the nature of a quo warranto, to deprive the defendant corporation of its corporate charter, and procure its dissolution on two grounds — First, for want of a substantial compliance with the statutory requirements in its formation; and second, for abandonment and misuse of its corporate franchise and powers, and for alleged violations of law.

In answer to the first point the respondent raises the preliminary objection that, by making the corporation a defendant, its corporate character is admitted, and cannot be questioned in this proceeding. As authority for this proposition the case of the People *v.* Stanford, 77 Cal. 360, 18 Pac. Rep. 85, and 19 Pac. Rep. 693, is chiefly relied upon. In that case it was alleged in the complaint that the assumed corporation had never been a corporation. If it were not a corporation of any character, it had no legal existence, and could not be sued. By making it a party, plaintiff conceded that it was a person that could be sued. It was said that the corporation could not be treated as a person which could be sued simply to obtain a judgment; that it was not and never had been such a person. There is no such inconsistency here. It is averred that the corporate defendant is a corporation de facto, but it is claimed that it did not become a corporation de jure, because the persons who attempted the incorporation did not comply with the conditions which the statute makes conditions precedent to its rightful incorporation. Under such circumstances, although the association is a legal entity, which may be sued, its right to corporate existence may be questioned by the state in a proceeding of this character. Section 358, Civil Code. This court said in People *v.* La Rue, 67

[1] As to the Departments of the Supreme Court, and as to Supreme Court Commissioners, see Preface to 97 California, pp. v–vii.

Cal. 530, 8 Pac. Rep. 84, and repeated the language in First Baptist Church v. Branham, 90 Cal. 22, 27 Pac. Rep. 60: "A corporation de facto may legally do and perform every act and thing which the same entity could do or perform were it a de jure corporation. As to all the world, except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid; and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious." Under such circumstances it seems clear that the corporation is not only a proper, but a necessary party. People v. Flint, 64 Cal. 49, 28 Pac. Rep. 495; People v. Gunn, 85 Cal. 244, 24 Pac. Rep. 718.

It is contended that the corporation is not rightfully such because, while five incorporators signed the articles of incorporation, only four acknowledged the same. Section 292 of the Civil Code reads as follows: "The articles of incorporation must be subscribed by five or more persons, a majority of whom must be residents of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property." It was said in People v. Selfridge, 52 Cal. 331: "The right to be a corporation is in itself a franchise; and, to acquire a franchise under a general law, the prescribed statutory conditions must be complied with." Still, a substantial, rather than a literal, compliance will suffice. People v. Stockton & V. R. Co., 45 Cal. 313. Was there substantial compliance in this case? Because a substantial compliance will do, it does not follow that any positive statutory requirement can be omitted, on the ground that it is unimportant. They are conditions precedent to acquiring a statutory right, and none can be dispensed with by the court. What is a substantial, rather than a literal, compliance, may be illustrated from the cases. In Ex parte Spring Valley Waterworks, 17 Cal. 132, the certificate stated the place of business, but did not describe it as the "principal place of business," as required. The court said: "The statement that San Francisco was the place of business would seem to imply that it was not only the principal, but the only, place of business." In People v. Stockton & V. R. Co., 45 Cal. 306, the affidavit required in such cases to be attached to the certificate stated that 10 per cent of the amount subscribed had been actually paid in, omitting the words "in good faith," which the statute required. In the certificate it was stated that more than 10 per cent had been actually in good faith paid in. It was held sufficient, and it would seem that, if it was actually paid in cash, it must have been paid in good faith; and it was further held that payment by checks drawn against sufficient funds in a bank, which was ready to accept and pay the checks, was substantially payment in cash. In People v. Cheeseman, 7 Colo. 376, the acknowledgment taken by the notary omitted to state that the persons whose acknowledgments were taken were personally known to the notary. The certificate did state that the persons

who signed appeared before him and acknowledged it. The statute did not prescribe what the acknowledgment should contain, and it was held a substantial compliance with the requirement, although the form prescribed for acknowledgments to deeds was not followed. It was acknowledged. In all these cases it will be seen that the thing required was done, but not literally as directed; but there was no omission of any requirement. No case has been cited where the entire omission of a thing prescribed has been excused, unless it be the case of Larrabee *v.* Baldwin, 35 Cal. 155. That was not an action instituted by the state to disincorporate on the ground of noncompliance. As we have seen, unless the state complains, a de facto corporation must be considered, under our Code, as possessing a corporate character; and the stockholders, when sued upon their individual liability, should not be allowed to make the point that they did not comply with the law. In that case the certificate was signed by five directors, but two failed to acknowledge it. Other questions are discussed at great length in the opinion, but in regard to the point made on the certificate it was simply remarked: "It is not clear that any fatal defect exists in the certificate of incorporation. If so, it is cured by the act of April 1, 1864." Plainly it was unnecessary to consider the question. The curative act referred to declares: "All associations or companies heretofore organized, and acting in the form and manner of corporations, and that have filed certificates for the purpose of being incorporated, but whose certificates are in some manner defective, or have been improperly acknowledged before a person not authorized by law to take such acknowledgments, are hereby declared to be, and to have been, corporations from the date of the filing of such certificates, in the same manner and to the same effect and intent as if such certificates were without fault, and properly acknowledged before the proper officer; and all such certificates are hereby validated, and declared to be legal, and shall have the same force and effect as if such certificates were free from all fault or defect, and were properly acknowledged," etc. St. 1863–64, p. 303. Section 292 of the Civil Code requires the articles to be subscribed and acknowledged by each. As this is an express condition precedent to a valid incorporation, it is not of consequence to the court whether it be a wise or necessary requirement or not. Still, it is easy to see a reason for it. The certificate secures the state, and all concerned, against the possibility of any fictitious names being subscribed to the articles, and furnishes proof of the genuineness of the signatures. If the acknowledgment can be dispensed with as to one, why not as to two or three, or all? Ordinarily, no doubt, the state would not be expected to institute a proceeding of this character for such a defect alone, and we must presume that the attorney general would not have instituted this inquiry if he were not convinced that there were reasons sufficient to justify it. Other reasons are alleged; but, as the statute authorizes a proceeding to forfeit the charter where the statute has not been complied with, although the corporation is acting in good faith, and is a

de facto corporation, the complaint must be held to state a cause of action, and the demurrer should be overruled. The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

HAYNES, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

DE HAVEN, J., MCFARLAND, J., FITZGERALD, J.

NEWCOMB *v.* REED.

1866. 12 *Allen*, 362.

CONTRACT, in which the plaintiff sought to charge the officers of the Boston Mechanical Bakery Company with a debt contracted in the name of the corporation, in consequence of their neglect to file certificates and statements of the condition of the corporation. At the trial in the superior court, before *Ames*, J., without a jury, the judge found for the defendants upon facts which are stated in the opinion; and the plaintiff alleged exceptions.

C. B. Goodrich & E. Avery, for the plaintiff.

E. Merwin, for the defendants.

HOAR, J. The defence to this action rests wholly upon the assumption that the corporation, whose officers the plaintiff seeks to charge with a statute liability for its debts, never had a legal existence. The only defect suggested in the organization of the corporation is, that the call for the first meeting was signed by only one of the persons named in the act of incorporation, and not by a majority of them, as required by *St.* 1855, *c.* 140.

The case of *Utley* v. *Union Tool Company*, 11 Gray, 139, is the authority on which the defendants chiefly rely. That case decided that in order to charge as stockholders of a manufacturing corporation persons who had been summoned in an action against it under St. 1851, c. 315, the plaintiff must prove the legal existence of the corporation. The alleged corporation had no charter or act of incorporation from the legislature, but was an association which had undertaken to assume corporate powers under a general act for the formation of joint stock companies, *St.* 1851, *c.* 133. That statute authorized three or more persons who had entered into "articles of agreement in writing" for the transaction of certain kinds of business, to organize in a manner prescribed, and thereby to become a corporation; and the court were of opinion that written articles of agreement were essential to constitute a corporation, and that these articles must fix the amount of the capital stock, and set forth distinctly the purpose for which and

the place in which the corporation was established. The court say, "There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorporation, by which corporate rights and privileges are usually granted." And they add that "it is not a case of a defective organization under a charter or act of incorporation, nor of erroneous proceedings after the necessary steps were taken to the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being, which had the power of contracting debts or of rendering persons liable therefor as stockholders."

We think these reasons have no application to the case now before us. In this, there was an act of incorporation from the legislature. There is no question that the corporate powers which it conferred were assumed by the persons by whom it was intended that they should be enjoyed, so far as they chose to avail themselves of them. The organization was not strictly regular, but can hardly be considered even as defective.

And if the object of the statute is regarded, by which it is required that the first meeting shall be called by a majority of the persons named in the act of incorporation, it will be evident that it is directory merely, and only designed to secure the rights conferred by the charter to those to whom it was granted, among themselves, by providing an orderly method of organization. Thus, if all the persons interested should come together without any notice or call whatever, and proceed to accept the charter, and do the other acts necessary to constitute the corporation, we cannot doubt that their action would be valid, and that neither the public, nor any persons not belonging to the association, would have any interest to question their proceedings.

The purpose of the statute was probably to avoid such difficulties as were disclosed in the case of *Lechmere Bank* v. *Boynton*, 11 Cush. 369, where two parties had attempted to organize separately under the same charter, each claiming to be the corporation.

There is nothing in the facts found and reported to show that all persons interested were not actually notified of the meeting for organization. On the contrary, it would seem that they were. No one has questioned the regularity of the proceedings, or claimed, as in *Lechmere Bank* v. *Boynton*, a right to organize in a different manner. The evidence was ample to show that the persons named in the act of incorporation with their associates, or at least all of them who desired to do so, have accepted the act, organized under it, issued stock, elected officers who have acted and served in that capacity, carried on business, contracted debts, and exercised all the functions of corporate existence. It is therefore too late to deny that the corporation ever had any legal existence, or for these officers to avoid the liabilities which the statutes of the Commonwealth impose.

CHAPTER V.

ACQUISITION OF MEMBERSHIP — SUBSCRIPTIONS FOR STOCK.[1]

THRASHER v. PIKE COUNTY R. CO.

1861. 25 *Illinois*, 393.[2]

BREESE, J. The appellee, who was plaintiff in the court below, urges several reasons justifying a recovery in this case, which it is necessary to notice. The declaration contains a special count, averring, that on the nineteenth of March, 1856, the plaintiffs were a body politic and corporate, with power to construct and operate a railroad within the county of Pike, and authorized by law, as such corporation, to secure subscriptions to the capital stock of the company to the amount of one million of dollars, in shares of one hundred dollars each, and, desiring to ascertain what amount of stock would be subscribed, and not having opened regular subscription books, but intending so to do, agreed with the defendant that they would, in a reasonable time thereafter, open books for the purpose of securing such subscriptions, and that they would permit and allow the defendant, when the books should be opened, to subscribe to the capital stock of the company thirty shares of one hundred dollars each, and upon payment therefor, the defendant should be the owner of thirty shares of the capital stock of the company. It is then averred, that the defendant, in consideration of this promise, undertook and promised the plaintiff that he would subscribe to the stock of this company the sum of three thousand dollars, when the books should be opened for subscriptions; that this promise was by a writing, signed by the defendant, and by him de-

[1] The effect of fraud in obtaining subscriptions is not dealt with as a specific topic in this book. The general rule of law, that a contract induced by fraudulent representations is voidable at the option of the innocent party, "applies with full force both to contracts of membership and to contracts to purchase or to take shares in a corporation at a future time." But, of course, the right to avoid a subscription induced by fraud may be barred by *laches*. And, in view of the peculiar character of the contract of membership, "and the equitable relations which it creates as between the shareholders and creditors and between the shareholders themselves," the person defrauded "must proceed with the utmost diligence if he desires to annul his contract." See 1 Morawetz on Private Corporations, 2d ed. ss. 94 and 108. — ED.

[2] Statement omitted. Only so much of the opinion is given as relates to a single point. — ED.

livered to the plaintiff. It is then averred, that on the same day, subscription books to the capital stock of the company were opened, of which the defendant had notice. The breach is, that the defendant neglected and refused to subscribe anything to the capital stock, accompanied by an averment that the subscription, when the books were opened, was due and payable before the commencement of the suit, and although notified thereof, the defendant has refused to pay any part of the sum of three thousand dollars. The common counts are added, in one of which the indebtedness is alleged to be for one hundred shares of the stock of the Pike County Railroad, before that time bargained and sold to the defendant.

This is the cause of action as set forth by the plaintiffs, and it is claimed by them, that they are entitled to recover as damages the par value of the stock, or the amount of calls made from time to time upon it, and which, at the commencement of the suit, amounted to fourteen installments, of five per cent. each, making, in all, twenty-one hundred dollars.

This, we do not think, is a fair view of the defendant's liability upon his promise, if one was made to the plaintiffs. His undertaking is, to subscribe a certain amount of stock, when the subscription books should be opened. This promise does not make him a stockholder, and, as such, liable to calls. The company has parted with no stock to him, and can only claim as damages, the actual loss sustained by them by his failure, or refusal to subscribe, when he was notified the books were opened for such purpose. The company has the stock which the defendant promised to take, but did not take. His promise is like any other promise, or agreement to purchase any specific article of property. If the property contracted for be retained by the vendor, and there is no delivery to the purchaser, or offer to deliver, the damages must not be measured by the value of the property; for it would not be just, in such cases, that the vendor should retain the property, and recover, also, the value of it from the promisor. Some damage might result from the loss of a bargain, and to such the vendor would be entitled, if the extent could be established. In many cases, they would be merely nominal. On an agreement for the sale and purchase of stocks, and a refusal by the purchaser to take the stocks, the measure of damages, ordinarily, might be the difference between the par value of the stocks and their market value, or between them and money. As well argued by the appellant, the defendant having violated his promise by failing to subscribe, he has acquired no right to stock; nor could a recovery in this action entitle him to become a stockholder. The company retains its stock, and the defendant his money. A stock certificate of three thousand dollars would represent a value to the company equivalent to so much money, and, in a statement of their liabilities, this would appear against the company as so much held by the stockholders, for which the company was responsible. If there is no actual subscription, the company does not incur

this liability. There being no special damages alleged, or proved, we do not think the plaintiffs could recover under this declaration, as they have done, the par value of the stock the defendant promised and agreed to take. A proper count might doubtless be so framed as to justify a full recovery, under sufficient proof.

[Remainder of opinion omitted.]

Judgment reversed.

WINDSOR ELECTRIC LIGHT CO. *v.* TANDY.

1893. 66 *Vermont*, 248.[1]

TYLER, J. This is an action of general assumpsit brought by the plaintiff company to recover of the defendant an assessment upon his subscription for shares of the plaintiff's capital stock. After the defendant had rested the court directed a verdict upon the ground that the action could not be maintained in the absence of an express promise.

It appeared in evidence that the defendant and eight other persons, on Feb. 21, 1890, associated themselves together as a corporation, under ch. 153, R. L., as follows:

"We, the subscribers, hereby associate ourselves together as a corporation under the laws of the state of Vermont, to be known by the name of the Windsor Electric Light Co., for the purpose of furnishing electric light, electric heat and electric power at Windsor, in the county of Windsor, in the state of Vermont, with a capital stock of five thousand dollars, divided into two hundred shares of twenty-five dollars each. Dated at said Windsor, this 21st day of February, A. D. 1890."

The articles of association were duly recorded July 3, 1890, in the office of the secretary of state, whereupon the corporation was organized, by-laws were adopted and officers were elected as provided by the statute. At a meeting held Nov. 29, 1890, it was voted to assess the stock one hundred cents on each dollar subscribed, and the assessment was made payable Dec. 15, 1890.

The defendant's subscription was as follows:

"*Frank H. Tandy*, ... 80 shares,"

following which were the names and subscriptions of the other eight subscribers.

Section 3260, R. L., ch. 152, provides that when a proprietor in any corporation does not pay a tax or assessment laid or assessed by such corporation, agreeably to the by-laws thereof, the treasurer may sell, by public auction, the shares of the delinquent under such regulations as the corporation, by its by-laws, directs. There was no provision in

[1] Statement and arguments omitted; also part of the opinion. — ED.

the by-laws that the plaintiff might sell delinquent stock, as is permitted by this section of the statute.

The plaintiff claims that the defendant's subscription to the capital stock raised an implied promise by him to pay all assessments lawfully laid upon his stock, and that the statutory remedy was merely cumulative. The defendant contends that, as there is no provision for the enforcement of payment of assessments either in chapter 153, in the by-laws, or in the articles of association, the plaintiff's only remedy is by a forfeiture and sale, as provided in section 3260.

When the defendant and others, by articles, had associated themselves together pursuant to the provisions of the statute, and the articles had been recorded and certified by the secretary of state, and the corporation had been organized, and all the conditions precedent required by the statute had been complied with, those persons became a body politic and corporate under the laws of the state. The plaintiff's corporate existence was then and thereby established, and the defendant became, by the act of subscription, a stockholder. His subscription is presumed to have been accepted by the plaintiff, and it was binding upon it and upon the defendant, the prospective rights of membership being a sufficient consideration to support the contract. Beach on Pri. Cor., ss. 63 and 513; *Hartford & New Haven R. Co.* v. *Kennedy*, 12 Conn. 499.

Whether the defendant, by becoming a stockholder, incurred a personal liability to pay his proportion of such assessments as should be laid upon the stock, can best be determined by inquiring what the relation was which he assumed towards the corporation by the act of subscription. By agreement the entire capital was to be five thousand dollars, divided into two hundred shares of twenty-five dollars each. The defendant subscribed for and agreed to take eighty shares, and the corporation, by accepting his subscription, became obligated to assign that number of shares to him. It seems clear, then, that the defendant impliedly promised to contribute towards the entire capital as much money as his number of shares represented, and in such instalments and at such times as the corporation should require.

In *Lake Ontario, etc., R. Co.* v. *Mason*, 16 N. Y. 451, it was held that the defendant's subscription to the articles was, in effect, a contract to pay for the shares for which he subscribed. *Dayton* v. *Boist*, 31 N. Y. 435; *Phœnix Warehouse Co.* v. *Badger*, 67 N. Y. 294; *Merrimac Mining Co.* v. *Levy*, 54 Penn. St. 227.

Morawetz on Pri. Cor., s. 56, says that such a subscription does not constitute a mere executory contract of sale, but that the liability to pay the amount of the shares is an incident of the contract of membership; that the moment the subscriber assumes the status of a shareholder he becomes entitled to the rights and privileges incident to membership, and is liable to all the obligations of a stockholder, and must contribute the amount of capital subscribed by him. In section 128 the same writer says that the liability is not merely to

pay for the shares for which he has subscribed, but to contribute to the capital of the company in proportion to the number of shares he has taken. See notes to same section. In Massachusetts, Maine and New Hampshire a different rule has obtained. In those states it has been held that, unless there is an express promise to pay for the shares, the subscriber incurs no personal liability.

[After commenting upon *Essex Bridge Co.* v. *Tuttle*, 2 Vermont, 393; *Conn. & Pass. R. Co.* v. *Bailey*, 24 Vermont, 465; and *R. & B. R. Co.* v. *Thrall*, 35 Vermont, 536.]

Judge Aldis said in the opinion [in *R. & B. R. Co.* v. *Thrall*]:

"At an early day in railway enterprises it was claimed, that where provisions for forfeiture were embodied in the charter, the corporation could not sue for subscriptions, but must and could enforce the payment of them only by proceedings in forfeiture. But it has long been held that the right to sue and to declare stock forfeited co-exist, and that the latter proceeding is merely cumulative. Such it was intended to be in this charter." . . .

While the case cannot be regarded as authority upon the point here in controversy, we think that the rule stated in the extract quoted from the opinion is the more just, and ought to be adopted rather than the one that prevails in some of the other states.

It was not necessary that the defendant should *expressly* promise to pay for his shares, or to contribute his proportionate amount of the $5,000 capital. The promise is clearly *implied*, and the action can be maintained upon it. The remedy by forfeiture is only cumulative.

Judgment reversed and cause remanded.[1]

ATHOL MUSIC HALL CO. *v.* CAREY.

1875. 116 *Massachusetts*, 471.[2]

CONTRACT on the following agreement:

"We, the undersigned, severally promise and agree to and with each other that we will associate ourselves into a corporation, the name whereof shall be determined by the members thereof, and pay to the treasurer of said corporation the amount of the several shares set against our respective names, for the purpose of purchasing the homestead of Washington H. Amsden, in Athol, on Main Street, and erecting a public hall thereon. The amount of the capital stock of said corporation to be not less than twenty thousand dollars.

Names.	No. of shares.	Amount.
John Carey,	One,	$100."

[1] For an exhaustive argument in support of this view, see the opinion of HUNTINGTON, J., in *Hartford & N. H. R. Co.* v. *Kennedy*, 12 Conn. 499. —ED.

[2] Statement abridged. — ED.

The declaration alleged that the defendant entered into and signed the above contract, (a copy whereof was annexed,) and thereby agreed, in consideration of other parties signing similar agreements, to pay to the treasurer of the Athol Music Hall Company, the sum of $100, for one share in the capital stock of said corporation when it should be organized. It then alleged the organization, the purchase of the homestead of Amsden, the building of a public hall thereon, a demand for the $100, readiness to deliver the stock, and the refusal of the defendant to pay.

At the trial in the Central District Court of Worcester, the defendant asked the judge to rule that the action could not be maintained on the pleadings. This request was refused.

. . . . . .

There was evidence tending to show that in December, 1870, the defendant signed the agreement declared upon; that the act of incorporation was passed on March 3, 1871; that the corporation was duly organized on March 18, 1871, and that the name of the defendant was entered on the books of the corporation as a stockholder and notices were issued and directed to him of all the meetings.

The defendant then asked the judge to instruct the jury that if they were satisfied upon the evidence that the defendant never attended any meeting of the corporation at the time of its organization, or after its organization, the action could not be maintained, although the corporation still retained his name upon its books, and sent him notices of the meetings; that it was not enough for the plaintiff to show that it retained Carey's name upon its books, and otherwise considered him as entitled to a share in the capital stock, unless they are also satisfied that Carey did some act after its organization in ratification of his agreement.

The judge refused to give these instructions, but instructed the jury that if the plaintiff entered the defendant's name on the books of the corporation, as a stockholder, issued and directed notices to him of all its meetings, and gave him the same opportunities to attend the meetings and participate in the proceedings thereof as were given to other stockholders, they were authorized to find that the defendant's offer was accepted, and that he was received as a member of the corporation. The jury found for the plaintiff, and the defendant alleged exceptions.

H. L. Parker, for the defendant.

W. W. Rice & F. T. Blackmer, for the plaintiff.

WELLS, J. In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber, "to and with each other," is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced between each subscriber and each other who may have signed previously, or who should

sign afterwards, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case; to wit, as a contract with the common representative of the several associates.

In *Thompson* v. *Page*, 1 Met. 565, and *Ives* v. *Sterling*, 6 Met. 310, individuals subsequently selected by voluntary associations to receive and expend subscriptions, in accordance with the terms of the agreement of association, were allowed to maintain actions against individual subscribers for the amount of their several subscriptions. Being thus constituted the payees, they were construed to have become also the promisees under the written agreement. The same principle applies where the agreement contemplates the organization of a corporation, and refers the payment of the subscriptions to the proper officers of such corporation. See *People's Ferry Co.* v. *Balch*, 8 Gray, 303, 311.

In this agreement the treasurer of the corporation to be established is expressly made payee. The corporation is the aggregate of the several individuals entering into the agreement, one of whose terms was that they should thus associate and confer their individual rights upon the corporation. We are of opinion that the corporation, and the corporation alone, is the proper party to bring an action upon such an agreement.

The corresponding agreements of the other subscribers, the organization of the corporation, and the allotment to the defendant of the shares for which he subscribed, furnish sufficient consideration for his promise to take and pay for those shares. Although his promise was originally voluntary, or in the nature of a mere open proposition, yet having been accepted and acted on by the party authorized so to do, before he attempted to retract it, he has lost the right to revoke. His proposition has become an accepted mutual contract, and is binding upon him as well as upon the corporation. The votes of the corporation indicate sufficient authority for the institution of this suit in the corporate name and behalf.

These considerations dispose of all the objections, taken in various forms, to the maintenance of the action.

Exceptions overruled.[1]

[1] As to the question of "consideration," where the agreement to take shares is made simply by the subscribers among themselves; see the discussion in Taylor on Corporations, 4th ed. ss. 92, 93, 94. — ED.

JOHNSON *v.* KESSLER.

1888. 76 *Iowa*, 411.

APPEAL from Bremer District Court.

Action in chancery to restrain the collection of a tax voted by the electors of a township in aid of the construction of a railroad. Upon a trial on the merits plaintiffs' petition was dismissed. They now appeal to this court.

Boies, Husted & Boies, for appellants.

Gibson & Dawson, for appellees.

BECK, J. I. Counsel for plaintiffs insist that the tax voted is void for the reason that, as the stock authorized by the articles of incorporation of the company to whom the tax was voted was not all subscribed or taken, the corporation was not in fact in existence. Counsel's position, expressed in their own language, is this: "It was not in law a corporation until its required capital stock was subscribed." The ready answer to this objection is found in the statute. The purposes and objects of an incorporation is to clothe persons who associate themselves together for that purpose with authority and power to do lawful business as an individual. Code, sec. 1058. It is enacted that an incorporation may commence business as soon as its articles of incorporation are filed in the recorder's office. *Id.* sec. 1064. The corporation may, then, lawfully commence business, — that is, exercise its corporate authority and power, — when its articles of incorporation are filed. Nowhere is there an intimation in the statute that this authority and power cannot be exercised until all of its stock has been subscribed. There is nothing in the articles of incorporation of the railroad company to which the aid was voted, providing that the company shall not begin business until a prescribed amount of stock shall have been subscribed. *Peoria & R. I. Ry. Co.* v. *Preston*, 35 Iowa, 115, cited by plaintiffs' counsel, interprets the power of an Illinois corporation, in the absence of any statute similar to our own, authorizing corporations to commence business upon filing articles of incorporation, or upon the happening of any other prescribed event.

[Omitting opinion on other points.]

Affirmed.

SLOCUM *v.* PROVIDENCE STEAM AND GAS PIPE CO.

1870. 10 *Rhode Island*, 112.[1]

SLOCUM *v.* WARREN.

1871. 10 *Rhode Island*, 116.[1]

BILLS in equity, praying that defendants might be enjoined from selling plaintiff's land under executions recovered by them against the American Steam and Gas Pipe Co. The plaintiff was found by the Court to be a stockholder in the latter Company. Chapter 128, Rev. Stat., provides that every manufacturing company shall annually file a certain certificate; and that, if any of said companies shall fail so to do, all the stockholders of said company shall be jointly and severally liable for all the debts of the company then existing. It appeared that one, at least, of the creditors, Elizabeth Warren, made a loan to the Company, relying for repayment not only upon the credit of the Company, but also upon the personal liability of the stockholders, and of the plaintiff especially as one of them. Plaintiff contends that he is not subject to any such liability, for the reason that the American Steam and Gas Pipe Company never had any legal existence as a corporation.

Bradley and *John Eddy*, for plaintiff.

B. N. & S. S. Lapham, *James Tillinghast* and *Cobb*, for defendants.

DURFEE, J. [in *Slocum* v. *Providence &c. Co.*]. . . . The charter, or act of incorporation, for the American Steam and Gas Pipe Company, was granted or passed in 1867, the capital named in the charter or act being seventy-five thousand dollars. At that time, there was in force in the state a public statute which provided that no act of incorporation granted after the passage thereof, "for any other than for religious, literary, charitable, or cemetery purposes, or for a military or fire company, shall take effect until the persons therein incorporated shall have paid to the general treasurer the sum of one hundred dollars, if the capital limited by such act of incorporation is the sum or any less sum than one hundred thousand dollars." The hundred dollars, required by this statute, was not paid for the American Steam and Gas Pipe Company, and consequently, their act of incorporation never went into effect, if it is to be construed as passed subject to the statute. We think it is to be so construed, there being no clause of the act excepting it out of the operation of the statute. See *The Union Horse Shoe Works* v. *Lewis*, 1 Abbott U. S. 518.

The defendants contend that, even if the act has never gone into effect, the existence of the company as a corporation cannot be questioned in a collateral proceeding. It is undoubtedly the rule that, if a charter has once been duly granted and accepted, the state alone can

[1] Statement abridged. Only portions of the opinions are given. — ED.

enforce a forfeiture of the charter for any violation thereof, or failure to comply with its considerations on the part of the corporation; and that, until the state sees fit to enforce the forfeiture, the corporation is to be recognized as legally existing in all collateral proceedings. But here, the act of incorporation being inoperative, there never was any corporation to incur a forfeiture, or any charter to be forfeited. We know of no rule which precludes inquiry into the question, whether a company which assumes to act as a corporation has ever been incorporated, in any case, in the absence of any matter of estoppel to prevent the inquiry.

But the plaintiff, in order to have the relief which he seeks, ought to satisfy us, not only that his company is not a corporation, but also that he is entitled to show the fact as against its creditors. We assume, as we think the bills warrant us in assuming, that the plaintiff is a stockholder in the American Steam and Gas Pipe Company, though he has done nothing as such, except hold his stock. The question then is, whether a stockholder, who does nothing but hold his stock, is estopped, when pursued by a creditor of the supposed corporation, from denying its existence. We think he is so estopped. By becoming and continuing a stockholder, he holds himself out as a corporator, and so contributes to the belief that the company with which he is associated is a corporation. To permit a person who has so held himself out to say that he is not a corporator, when legally pursued as such, would be to permit him to take advantage of his own wrong. He is like a person who, having held himself out or suffered himself to be held out as a copartner, may be charged with the copartnership debts. Or he is like a person who, without authority, as executor or administrator, intermeddles with the property of a decedent, and so becomes chargeable as an executor in his own wrong. The plaintiff having assumed the character of a corporator, where he is sought to be charged as such, ought not to be heard to say that the character was falsely or unlawfully assumed. The fact that he was not active in the business of the company cannot avail him; for it is the assumption to hold the stock as if he were a corporator, which makes the mischief. It might easily happen that the stockholder, whose name contributed most to the credit of the supposed corporation, was least active in its business, and it would be plainly unjust to exempt him from liability to the creditors, merely because of his inactivity.

We are aware that in *Utley* v. *Union Tool Company*, 11 Gray, 139, the Supreme Court of Massachusetts exempted a stockholder from liability to a creditor of a supposed corporation, upon proof that the corporation had never legally come into being under the statute of that state. But it does not appear that in that case the question of estoppel was raised by the counsel or considered by the court. We should agree entirely with the Supreme Court of Massachusetts in their decision in any case in which the estoppel would be inapplicable.

. . . . . .

DURFEE, J. [in *Slocum* v. *Warren*]. . . We decided in the former case that having, by becoming a stockholder, helped to hold the company out as a corporation, he could not be permitted to say, when pursued by a creditor of the company, that he and his associates or predecessors had omitted to do an act which they ought to have done before organizing as a corporation, and that in consequence of this delinquency the company was not (what it purported to be) a legally established corporation. The plaintiff maintains that this decision was erroneous, and in support of his view, relies especially upon the cases of *Hudson* v. *Carman*, 41 Maine, 84; *Unity Insurance Company* v. *Cram*, 43 N. H. 636; *Utley* v. *Union Tool Company*, 11 Gray, 139; and *Gardner* v. *Post et al.* 43 Pa. St. 19. We propose to consider these and some of the other cases bearing upon the question, somewhat in detail.

[After commenting on various authorities, the opinion proceeds.]

The plaintiff also cites cases in which it has been held that a corporation duly established as such is not estopped from denying its liability where there is a want of power to contract the liability, the reason being, he says, that otherwise the powers of the corporation might be indefinitely enlarged; and he argues that, in the case at bar, the doctrine of estoppel is still less applicable, inasmuch as the company was acting not merely in excess of its corporate powers, but without any corporate power whatever. But in the case at bar, the defect of power exists not by reason of any insufficiency of the grant, but by reason solely of a delinquency on the part of the grantees of the power; and the estoppel, if applied, would be applied not to prevent an appeal to the charter to show a want of authority, but to prevent the introduction of evidence by the company or its members to prove their own delinquency. We do not think that in such a case there should be any hesitation to apply the doctrine of estoppel from fear that it would lead to an indefinite enlargement of the powers of the corporation. And see *Bargate* v. *Shortridge*, 5 H. L. Cas. 297, 318; *Zabriskie* v. *Cleveland, Columbus & Cincinnati Railroad Company et al.* 23 How. U. S. 381.

[After citing and commenting upon other authorities, the opinion proceeds.]

It is true these cases are not precisely like the case at bar, but they are cases which illustrate the application of the law of estoppel in respect to corporations, or companies acting as corporations, or which illustrate to what extent the corporate existence of a company acting as a corporation can be collaterally questioned. And we think it is safe to say upon the authority of these cases, that at least where there is an act or charter in existence, under which a company by taking the proper steps can become a corporation, if a company does *de facto* organize and hold itself out as a corporation, contracting obligations as such, it cannot, when sued upon such obligations, by persons who have dealt with it as such in good faith, be permitted to avoid a corporate

liability thereon, by setting up that it has not taken all the steps prescribed as conditions precedent to its legal existence as a corporation. If this be so in regard to the company as a whole, we do not see why it is not equally so in regard to each member of the company individually, in so far as membership imports an individual liability. In this case, it is said there was no act or charter; but in our opinion there was a charter duly granted by the legislature, subject only to a condition that it should not take effect until a certain act should be performed; but inasmuch as this act could have been performed, as it ought to have been performed, by the grantees of the charter before their organization as a corporation, the case does not, in our view, substantially differ from cases which are clearly within the rule above stated. Indeed it is frequently the case that a charter is granted subject to an implied condition, that the grant shall not take effect until it has been duly accepted; and yet, as we have seen, the doctrine of estoppel may be applied to prevent the want of such an acceptance from operating to defeat a just claim. *Camp* v. *Byrne*, *supra*; and see *Tobacco Pipe Makers' Co.* v. *Woodroffe*, 8 D. & R. 30, cited in Abbott's Dig. Law of Corp. p. 331, § 23. In this case the company had only to pay into the treasury of the state one hundred dollars, and all would have been right. When it organized as a corporation, and from year to year continued doing business as such, it as much as said, and each one of the stockholders as much as said, that that sum had been paid; and now neither the company nor any one of the stockholders ought to be heard to assert the contrary in order to escape any liability to which he or it would have been subject if the payment had been duly made.

This decision is doubtless a hard decision for the plaintiff, and we very much regret that his situation is such that he is so severely affected by it. But hard as the decision is for the plaintiff, it only subjects him to the liability to which he would have been subjected if the tax due the state had been paid, as it ought to have been paid, and therefore only to the liability which, as an honest man, he must be presumed to have intended to incur when he connected himself with the company.[1] [*Plaintiff's prayer denied.*]

[1] The statute under consideration in the above case was repealed by the Rhode Island General Statutes of 1872; and the following provision substituted: "No corporation shall be organized under a charter, until the petitioners . . . shall pay into the general treasury for the use of the State, one hundred dollars." In *Hughesdale Mfg. Co.* v. *Vanner*, 12 R. I. 491 (an action of assumpsit by the corporation), it was *held*, that, under the later statute, the failure to make the payment would be taken advantage of only by the State, and did not avail the defendant as a valid objection to the plaintiff's corporate existence. The Court said, that the payment prescribed by the later statute was not, like that prescribed by the earlier statute, a condition precedent to the existence of the corporation; but something required to be after the charter has gone into effect, and, if the charter is in the usual form, after the corporation has been created. — ED.

Barb. 634; *Haviland* v. *Chase*, 39 Barb. 283; *Taggart* v. *Western Md. Railroad Company*, 24 Md. 588; *People* v. *Rensselear Insurance Company*, 38 Barb. 323; *Patterson* v. *Arnold*, 45 Pa. St. R. 415.

If these views be correct, the act of incorporation is invalid, and the defendants are not entitled to exercise corporate powers.

Judgment reversed and cause remanded, with an order to the District Court to enter judgment for the plaintiff on the findings.

Mr. Justice TEMPLE did not participate in the foregoing decision.

BRODERIP *v.* SALOMON.

1895. *Law Reports* (1895), 2 *Chancery*, 323.

SALOMON *v.* SALOMON & CO., LIMITED.

1896. *Law Reports* (1897), *Appeal Cases*, 22.[1]

IN 1892, Aron Salomon was carrying on business as a leather merchant, &c., and was solvent. July 28, 1892, a Limited Company was registered, under the Companies Act of 1862, for the ostensible purpose of taking over and carrying on the business then conducted by Salomon.

The Act of 1862 provides (Section 6), that "any seven or more persons, associated for a lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the provisions of the Act in respect of registration, form a company with or without limited liability." "No subscriber shall take less than one share" (Section 8). The Act prescribes no minimum value for shares, and hence the shares may be of as small a value as those who form the company may please. Nor does the Act impose any limit upon the number of shares which a single member may subscribe for. Section 30 provides that no notice of any trust shall be entered on the register. Upon the registration of the memorandum of association, and of the articles (where required), the registrar shall certify that the company is incorporated. "The subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands." . . . (Section 18.)

The name of the company was Aron Salomon & Co., Limited. The nominal capital was 40,000*l.*, divided into 40,000 shares, of 1*l.* each. The memorandum of association was subscribed by Salomon, his wife, his daughter, and his four sons, each subscribing for one

[1] Statement rewritten. Arguments omitted; also portions of opinions. — ED.

share. Salomon then conveyed his business and its assets to the company for an agreed price of about 39,000*l.* In consideration of this conveyance, he received from the company some payments in cash, also debentures (a charge on the assets) for 10,000*l.*, and shares for the par value of 20,000*l.*[1] No other shares were ever allotted; and it was never intended that any shares should be allotted to any person except Salomon and the six members of his family. The practical result was, that Salomon owned $\frac{20001}{20000}$ of the allotted shares; and also held the company's debentures for 10,000*l.*[2]

Subsequently, Salomon, upon the security of his aforesaid debentures, obtained from Broderip a loan of 5000*l.*, which sum Salomon reloaned to the company. Thereafter, in Feb. 1893, the original debentures, which had been issued to Salomon for 10,000*l.*, were returned to the company and were cancelled. In lieu thereof, with the consent of Salomon as beneficial owner, fresh debentures of the company to the same amount were issued to Broderip in order to secure the payment of his aforesaid loan of 5000*l.*

Default having been made in the payment of his interest, Broderip, in the autumn of 1893, instituted an action, on behalf of himself and all the debenture holders, to enforce his security. Thereafter a winding up order was made and a receiver appointed.

The company put in a defence and counter-claim, making Salomon a party to the counter-claim. At the time of the company's going into liquidation, 11,264*l.* was due to unsecured creditors whose debts had been contracted since the formation of the company. About 7733*l.* of this was due to trade creditors, the rest to Salomon. The liquidator has realized the assets, by arrangement without prejudice to any question on the counter-claim. He has paid Broderip's "mortgage debt on the debentures," and the rest of the proceeds will not be sufficient to satisfy what remains due on the debentures. Salomon claims whatever there may be as owner of the debentures.

The action was tried before VAUGHAN WILLIAMS J. [The following is an abridgment of the opinion of the learned Judge.]

There was no fraud on the shareholders, inasmuch as they were all perfectly cognizant of the conditions under which the company was formed, and as there was no intention to allot further shares at a later period to outsiders. But the company was a mere nominee of Salomon's; and the case is to be dealt with as if the nominee, instead of

[1] According to a statement in the opinion of Lord Macnaghten, it would seem that, as cash came in to the company from the business, the company went through the form of handing this cash over to Salomon, and then immediately receiving the same cash back from Salomon in exchange for the 20,000 shares allotted to him as fully paid shares. — ED.

[2] The charge given to the debenture-holder by the company on its property did not operate to prevent the company, while solvent, from using assets to pay current debts; but it gave the debenture-holder a preference over unsecured creditors in the event of insolvency. See 14 Law Quarterly Review, 339; *Davey* v. *Williamson*, L. R. (1898), 2 Q. B. 194. Buckley on Companies Acts, 7th edition, 186; KAY, L. J. in L. R. (1895), 2 Chan. p. 343. — ED.

being the company, had been some individual agent of Salomon's to whom he had purported to sell this business. In that case the trustee in bankruptcy of the agent would have had a right to make Salomon indemnify the agent against the debts that he had contracted by the direction of his principal. The right of the liquidator in the present case is precisely the same, notwithstanding the debentures which were a mere form, intended to give an appearance of reality to a sale which, in fact, was no sale at all, because it was a sale by a man to an agent for his own profit. This business was Salomon's business, and no one else's. The creditors of the company could, in my opinion, have sued Salomon. Their right to do so would depend on the circumstances of the case, whether the company was a mere *alias* of the founder or not. The relationship of principal and agent existed between Salomon and the company. The moment the creditors succeed in establishing the identity of Salomon with the company, the creditors of the company thereupon are shown to be the creditors of Salomon; and although it is necessary, in order to get rid of the priority given to Salomon by these debentures, that one should fall back upon the lien of the company as his agent, whom he was bound to indemnify, I do not mean to exclude from my judgment that the debentures were given to Salomon by his agent, the company, and that the necessary effect of Salomon as principal, taking these debentures from his agent, the company, was that his creditors — for, according to my view, the creditors of the company were his creditors — were defeated and delayed by the debentures.

His Lordship made the following order: —

Declare that the plaintiffs, A. Salomon & Co. Limited, or the liquidator thereof are, or is entitled to be indemnified by the defendant A. Salomon against the sum of 7733*l.* 8*s.* 3*d.* . . .

Order and adjudge that the plaintiffs, A. Salomon & Co. Limited, do recover against defendant A. Salomon the said sum of 7733*l.* 8*s.* 3*d.*

Declare that plaintiffs, A. Salomon & Co. Limited, are entitled to a lien for the said sum of 7733*l.* 8*s.* 3*d.*, upon all sums which would be payable to defendant A. Salomon out of the assets of the plaintiffs A. Salomon & Co. Limited, in respect of the debentures issued by the said company to the defendant E. Broderip in the pleadings mentioned or otherwise, and that the defendant A. Salomon is not entitled to make any claim against the assets of the plaintiffs A. Salomon & Co. Limited, until the said sum of 7733*l.* 8*s.* 3*d.* has been satisfied.

Aron Salomon gave notice of appeal. The company gave a counter-notice of contention that [*inter alia*] they were entitled to have the agreement for the sale of Salomon's business and property to the company rescinded.

Buckley, Q. C. and *Muir Mackenzie* (*McCall, Q. C.* with them), for Salomon.

Farwell, Q. C. and *Theobald*, for the company.

LINDLEY L. J. This is an appeal by Mr. Aron Salomon against an order made by Vaughan Williams J., and which, in effect, directs Mr. A. Salomon to indemnify a limited company formed by him against the unsecured debts and liabilities incurred by or in the name of the company whilst it carried on business.

The appeal raises a question of very great importance, not only to the persons immediately affected by the decision, but also to a large number of persons who form what are called "one-man companies." Such companies were unheard of until a comparatively recent period, but have become very common of late years.

The material facts of this case are as follows: [His Lordship, after stating the facts of the case to the same effect as above, and adding that as to the 20,000 shares allotted to Aron Salomon he (Aron Salomon) contended he had paid for them though no call had ever been made; that the liquidator, on the other hand, claimed 20,000*l.* from A. Salomon in respect of these shares; that A. Salomon had received moneys from the company, but that it did not appear whether he had paid the company for his shares, and that this was a matter which it was unnecessary to pursue further on the present occasion, proceeded as follows:—]

I proceed to examine the legal aspect of this case, which, as I have said, is one of great general importance. There can be no doubt that in this case an attempt has been made to use the machinery of the Companies Act, 1862, for a purpose for which it never was intended. The legislature contemplated the encouragement of trade by enabling a comparatively small number of persons — namely, not less than seven — to carry on business with a limited joint stock or capital, and without the risk of liability beyond the loss of such joint stock or capital. But the legislature never contemplated an extension of limited liability to sole traders or to a fewer number than seven. In truth, the legislature clearly intended to prevent anything of the kind, for s. 48 takes away the privilege conferred by the Act from those members of limited companies who allow such companies to carry on business with less than seven members; and by s. 79 the reduction of the number of members below seven is a ground for winding up the company. Although in the present case there were, and are, seven members, yet it is manifest that six of them are members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the legislature intended not to be done; and, ingenious as the scheme is, it cannot have the effect desired so long as the law remains unaltered. This was evidently the view taken by Vaughan Williams J.

The incorporation of the company cannot be disputed. (See s. 18 of the Companies Act, 1862.) Whether by any proceeding in the nature of a scire facias the Court could set aside the certificate of incorporation is a question which has never been considered, and on which I express no opinion; but, be that as it may, in such an action as this

the validity of the certificate cannot be impeached. The company must, therefore, be regarded as a corporation, but as a corporation created for an illegitimate purpose. Moreover, there having always been seven members, although six of them hold only one 1*l.* share each, Mr. Aron Salomon cannot be reached under s. 48, to which I have already alluded. As the company must be recognized as a corporation, I feel a difficulty in saying that the company did not carry on business as a principal, and that the debts and liabilities contracted in its name are not enforceable against it in its corporate capacity. But it does not follow that the order made by Vaughan Williams J. is wrong. A person may carry on business as a principal and incur debts and liabilities as such, and yet be entitled to be indemnified against those debts and liabilities by the person for whose benefit he carries on the business. The company in this case has been regarded by Vaughan Williams J. as the agent of Aron Salomon. I should rather liken the company to a trustee for him — a trustee improperly brought into existence by him to enable him to do what the statute prohibits. It is manifest that the other members of the company have practically no interest in it, and their names have merely been used by Mr. Aron Salomon to enable him to form a company, and to use its name in order to screen himself from liability. This view of the case is quite consistent with *In re George Newman & Co.*[1] In a strict legal sense the business may have to be regarded as the business of the company; but if any jury were asked, Whose business was it? they would say Aron Salomon's, and they would be right, if they meant that the beneficial interest in the business was his. I do not go so far as to say that the creditors of the company could sue him. In my opinion, they can only reach him through the company. Moreover, Mr. Aron Salomon's liability to indemnify the company in this case is, in my view, the legal consequence of the formation of the company in order to attain a result not permitted by law. The liability does not arise simply from the fact that he holds nearly all the shares in the company. A man may do that and yet be under no such liability as Mr. Aron Salomon has come under. His liability rests on the purpose for which he formed the company, on the way he formed it, and on the use which he made of it. There are many small companies which will be quite unaffected by this decision. But there may possibly be some which, like this, are mere devices to enable a man to carry on trade with limited liability, to incur debts in the name of a registered company, and to sweep off the company's assets by means of debentures which he has caused to be issued to himself in order to defeat the claims of those who have been incautious enough to trade with the company without perceiving the trap which he has laid for them.

It is idle to say that persons dealing with companies are protected by s. 43 of the Companies Act, 1862, which requires mortgages of limited companies to be registered, and entitles creditors to inspect the

[1] [1895] 1 Ch. 674.

register. It is only when a creditor begins to fear he may not be paid that he thinks of looking at the register; and until a person is a creditor he has no right of inspection. As a matter of fact, persons do not ask to see mortgage registers before they deal with limited companies; and this is perfectly well known to every one acquainted with the actual working of the Companies Acts and the habits of business men. Mr. Aron Salomon and his advisers, who were evidently very shrewd people, were fully alive to this circumstance.

If the legislature thinks it right to extend the principle of limited liability to sole traders it will no doubt do so, with such safeguards, if any, at it may think necessary. But until the law is changed such attempts as these ought to be defeated whenever they are brought to light. They do infinite mischief; they bring into disrepute one of the most useful statutes of modern times, by perverting its legitimate use, and by making it an instrument for cheating honest creditors.

Mr. Aron Salomon's scheme is a device to defraud creditors.

Agreeing as I do in substance with Vaughan Williams J., I do not think it necessary to investigate the question whether the so-called sale of the business to the company ought to be set aside. The only object of setting it aside is to obtain assets wherewith to pay the creditors, and this object can be attained on sound legal principles by the order which he has made. In the event, however, of this case going further, I will add that I regard the so-called sale of the business to the company as a mere sham, and that in my opinion it might, if necessary, be set aside by the company in the interest of its creditors, although all the shareholders, such as they were, knew of and assented to the arrangement. They were simply assisting Mr. Aron Salomon to carry out his scheme. I cannot regard *In re British Seamless Paper Box Co.*[1] as an authority against a rescission of such a transaction as this.

We have carefully considered the proper form of order to be made on this appeal, and the order of the Court will be as follows: The Court, being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and, further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures, dismiss the appeal of Aron Salomon with costs; and, it being unnecessary to make any order on the liquidators' cross-notice of appeal, discharge the order directing the liquidator to pay costs of the counter-claim, and give him those costs.

Lopes L. J. This is a case of very great importance, and I wish shortly to state my reasons for concurring in the judgment just delivered. I do not propose to restate the facts so fully and clearly

[1] 17 Ch. D. 467.

From the above decision, Salomon appealed to the House of Lords. His appeal was brought *in forma pauperis*. The company brought a cross appeal against the part of the order refusing rescission of the contract for the sale of Salomon's business to the company. [The decision on these appeals is reported under the name of *Salomon* v. *Salomon & Co. Limited.*]

Cohen, Q. C., Buckley, Q. C., McCall, Q. C., and *Muir Mackenzie*, for Aron Salomon.

Farwell, Q. C., and *Theobald*, for the company.

LORD HALSBURY, LORD CHANCELLOR. My Lords: The important question in this case, and I am not certain that it is not the only question, is whether the respondent company was a company at all; whether, in truth, that artificial creation of the Legislature had been validly constituted in this instance; and, in order to determine that question, it is necessary to look at what the statute itself has determined in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself.

. . . . . .

I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is enough. Still less is it possible to contend that the motive of becoming shareholders, or of making them shareholders, is a field of inquiry which the statute itself recognizes as legitimate. If they are shareholders they are shareholders for all purposes, and, even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the *cestui que trusts* of the seventh, whatever might be their rights *inter se*, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities; and dealing with them in their relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body.

. . . . . .

I will, for the sake of argument, assume the proposition that the Court of Appeal lays down, that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself, and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

I observe that the learned judge (Williams, J.,) held that the business was Mr. Salomon's business and no one else's, and that he chose

to employ as agent a limited company. And he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent — the company. I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon; if it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.

. . . . . .

The learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing, if it had a legal existence, and if, consequently, the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered.

Williams, J. appears to me to have disposed of the argument that the company, which for this purpose he assumed to be a legal entity, was defrauded into the purchase of Aron Salomon's business, because, assuming that the price paid for the business was an exorbitant one, as to which I am myself not satisfied, but assuming that it was, the learned judge most cogently observes that when all the shareholders are perfectly cognizant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend that the company is being defrauded.

. . . . . .

The truth is that the learned judges have never allowed in their own mind the proposition that the company has a real existence. They have been struck by what they considered the inexpediency of permitting one man to be, in influence and authority, the whole company, and assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law, and, whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there.

I have dealt with this matter upon the narrow hypothesis propounded by the learned judges below, but it is, I think, only justice to the appellant to say that I see nothing whatever to justify the imputations which are implied in some of the observations made by more than one of the learned judges. The appellant, in my opinion, is not shown to have done, or to have intended to do, anything dishonest or unworthy, but to have suffered a great misfortune without any fault of his own.

CHAPTER VI.

PROMOTERS.

ERLANGER v. NEW SOMBRERO PHOSPHATE CO.

1878. *Law Reports, 3 Appeal Cases*, 1218.[1]

APPEAL against a decision of the Court of Appeal which had reversed a decree of Vice Chancellor *Malins*.

Sombrero, a small island in the West Indies, the property of the Crown, had been leased out by the Crown for 21 years from 1865. This lease had been assigned to "The Sombrero Company," which undertook to work the beds of phosphate of lime with which the island abounded. This company was ordered to be wound up. The lease was ordered to be sold by the official liquidator, Mr. Chatteris. Erlanger and others formed a syndicate to purchase it, and did purchase it for £55,000. The purchase was effected by a provisional contract Aug. 30, 1871, though not formally concluded until later. The syndicate desired to resell the lease at a profit; and with that view proceeded to get up a company to purchase it from the syndicate.

Erlanger, who acted for the syndicate, took steps to form a company, under the Companies Act. A memorandum of association was drawn up by the solicitor of the syndicate, and was signed by seven persons all of whom were mere nominees of the syndicate. The articles of association for the company were drawn by the same solicitor, and bear date Sept. 20, 1871. These articles provide that the first board of directors shall consist of five specified persons; that two directors shall be a quorum for the transaction of business; and that the directors may, without any further authority from the members, adopt and carry into effect the contract, of even date, for the assignment to the company of the island of Sombrero for the residue of the term of the lease.

A contract had also been drawn up, and dated Sept. 20, for the sale of the lease to the new company. This contract purported to be made between Evans as vendor and Pavy as purchaser on behalf of the new company. Evans was a trustee or agent for the members of the syndicate. The contract was, on the face of it, a provisional one,

[1] Case abridged. Arguments omitted; also greater part of the opinions. — ED.

subject to the formation of the company, and the adoption of the contract by it. This contract recited the purchase by the syndicate on Aug. 30, but did not name the price then given. The price to the new company was to be £110,000, of which £80,000 was to be paid down, and the remaining £30,000 to be satisfied by fully paid-up shares in the new company. The money was to be obtained by the subscriptions for the shares, which were to be 13,000 in number of £10 each.

The five persons specified in the articles as directors were all named by the syndicate. Two of them were persons not likely to act, and who did not act, in the early proceedings of the board. The other three were Evans, Macdonald and Dakin. Evans' shares were given to him by Erlanger. Macdonald held shares only as trustee for Erlanger. Dakin had not sufficient knowledge of the facts to form an independent judgment. The first meeting of the directors was held Sept. 29, 1871; and was attended by Evans, Macdonald and Dakin. It was resolved that the contract of purchase for £110,000 "be approved and confirmed." A prospectus was soon issued; and after its publication the number of applications for shares became considerable.

There was never any confirmation of the purchase by vote of the stockholders.

Subsequently, after new directors had been chosen, the bill in this suit was filed by the company against Erlanger and all the members of the syndicate; one prayer being that the contract of Sept. 20 might be set aside; and the purchase money repaid to the company.

The case was heard before Vice Chancellor Malins, who ordered the bill to be dismissed, but without costs. On appeal by the company, the contract was ordered to be rescinded as to all members of the syndicate, the purchase money paid by the company repaid, and, on payment of the money so ordered to be repaid to the company, the island was to be restored by the company to the syndicate.

Erlanger *et als.* then brought the present appeal to the House of Lords.

The case was twice argued.

Southgate, Q. C., and *Benjamin*, Q. C. (*Ingle Joyce* with them), for appellants.

J. Napier Higgins, Q. C., and *Davey*, Q. C. (*Alexander Young* with them), for respondents.

Lord Penzance. [After stating the facts.]

Can a contract so obtained be allowed to stand? The bare statement of the facts is, I think, sufficient to condemn it. From that statement I invite your Lordships to draw two conclusions: first, that the company never had an opportunity of exercising, through independent directors, a fair and independent judgment upon the subject of this purchase; and, secondly, that this result was *brought about by the conduct* and contrivance of the vendors themselves. It

was the vendors, in their character of promoters, who had the power and the opportunity of creating and forming the company in such a manner that with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing they used that power and opportunity for the advancement of their own interests. Placed in this position of unfair advantage over the company which they were about to create, they were, as it seems to me, bound according to the principles constantly acted upon in the Courts of Equity, if they wished to make a valid contract of sale to the company, to nominate independent directors and fully disclose the material facts. The obligation rests upon them to shew they have not made use of the position which they occupied to benefit themselves; but I find no proof in the case that they have discharged that obligation. There is no proof that either Sir *Thomas Dakin* or Admiral *Macdonald* was aware of the price at which the property had just been brought under the authority of the Court of Chancery, nor, indeed, that they even knew that the real vendors were also the promoters of the company. And there is certainly no proof that in the selection of the directors who were to be the company's agents for accepting and affirming the proposed purchase, the vendors used their power as promotors in such a way as to create an independent body capable of acting impartially in defence of the company's interests.

A contract of sale effected under such circumstances is, I conceive, upon principles of equity liable to be set aside.

The principles of equity to which I refer have been illustrated in a variety of relations, none of them perhaps precisely similar to that of the present parties, but all resting on the same basis, and one which is strictly applicable to the present case. The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of Equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relation and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that position, the burden of shewing that he has not used it to his own benefit.

I have no difficulty, therefore, in asking your Lordships to assent to the proposition of the Lord Chancellor, that if, within a proper time after the completion of this purchase, a bill had been filed by the company, the purchase must have been set aside. The question remains whether the present bill has been filed with sufficient promptitude for that purpose.

[His Lordship *held*, that the company was not barred by *laches*. The facts relating to this branch of the case have been omitted.]

Lord Cairns; Lord Chancellor.

[After referring to purchase by the syndicate on Aug. 30, 1871.]

My Lords, I stop at this point for the purpose of saying that I think it to be clear that the syndicate in entering into this contract acted on behalf of themselves alone, and did not at that time act in, or occupy, any fiduciary position whatever. It may well be that the prevailing idea in their mind was, not to retain or work the island, but to sell it again at an increase of price, and very possibly, to promote or get up a company to purchase the island from them; but they were, as it seems to me, after their purchase was made, perfectly free to do with the island whatever they liked; to use it as they liked, and to sell it how, and to whom, and for what price they liked. The part of the case of the Respondents which, as an alternative, sought to make the Appellants account for the profit which they made on the re-sale of the property to the Respondents, on an allegation that the Appellants acted in a fiduciary position at the time they made the contract of the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the Judges in the Courts below.

[After stating the subsequent proceedings up to and including Sept. 20.]

In the whole of this proceeding up to this time the syndicate, or the house of *Erlanger* as representing the syndicate, were the promoters of the company, and it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person.

. . . . . .

[His Lordship was of opinion that the company was barred by *laches* from obtaining the relief prayed for.]

such case to deal with. Mr. T. H. Lambert, the promoter, has ingeniously endeavored to shield himself from the consequences of concealing a contract to which he dared not allude, and his appeal, like the others, must be dismissed with costs.

[Sir F. H. Jeune and Romer, L. J., concurred; the latter delivering an opinion upon another branch of the case.]

Appeal dismissed.

McELHENNY'S APPEAL.

1869. 61 *Pennsylvania State*, 188.[1]

Bill filed by Hubert Oil Company against the administrators of McElhenny's estate.

McElhenny purchased land, probably at a cost of much less than $12,000. This land he sold to Baird and others; upon their agreement that he should receive $12,000; and should also receive a share of the profits to be made by the purchasers from him, in case they put it into a company at the sum of $40,000. Baird *et als.* then promoted the formation of the plaintiff corporation. Stock was subscribed to the amount of more than $40,000; McElhenny's name appearing as a subscriber to the extent of $2000. The promoters sold the land to the corporation for $40,000. Out of this sum McElhenny was paid the $12,000, due from Baird *et als.* as purchase money. The balance of $28,000 was divided as profit among the promoters; McElhenny receiving as his share the sum of $2083.84. The sale to the corporation was made under such circumstances that the promoter-vendors were compellable to refund to the corporation the profit they received.

The corporation claimed that McElhenny should account to it for the profit received by McElhenny on the sale which he made to Baird *et als.*, as well as the profit received by McElhenny on the sale by Baird *et als.* to the corporation. The court below, apparently adopting this basis, decreed that the administrators should pay to the corporation the sum of $9083.84.

From this decree, the administrators appealed.

T. Archer, Jr. (*L. C. Cassidy* with him), for appellants.

E. S. Miller (*C. B. Penrose* with him), for appellees.

Thompson C. J.

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In order to bring the intestate's estate into liability to the company for money received by him in payment for the land, it must be made to appear that he occupied some fiduciary relation to it, so that

[1] Statement abridged. Arguments and part of opinion omitted. — Ed.

the receipt of the money, although received by him for his own use, was, by means of the fraud practised in his fiduciary relation, money of the company. It is not damages in a case like this that equity gives, it is restoration of the thing wrongfully taken, viz. the money received, or an equal sum and interest.

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It nowhere appears that McElhenny, the purchaser from Hubert, the original owner, did it as the agent of Messrs. Baird, Boyd & Co. and others, although he bought it to sell again, no doubt.

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If the property was not purchased by McElhenny for the use and as agent of the company, but for his own use (and this is the proof in the case), he might sell it at a profit most assuredly. No subsequent purchasers from his vendees would have any right to call upon him to account for the profits made on his sale. The parties to whom he sold have never asked him to account to them for the profit at which he sold to them. They have not pretended that he was their agent in making the purchase, and I am unable to understand the ground of a right in the company to demand it. The difference between the sum he paid and that at which he sold, he was as fairly entitled to as to the sum paid. Seeing no evidence of agency, or of a trust, or a fiduciary relation between the plaintiff and the defendant's intestate thus far, we are of opinion that there was error in decreeing payment of any portion of the profits made by him in the sale to the promoters of the Hubert Oil Co.; and to the extent of $7000 the decree is to be modified.

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At this point another inquiry arises, is the estate of McElhenny liable in equity to refund to the company the share of the profits received by him over the sum of $12,000? We are inclined to think it is.

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After selling to Baird, Boyd and others, and then joining them in selling to the company, he assumed their position and liabilities, and if they could not make a profit, he could not.

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[*Decree against McElhenny's estate for* $2083.84.]

SHARSWOOD, J., dissented.

LANDMAN *v.* ENTWISTLE.

1852. 7 *Exchequer*, 632.[1]

Assumpsit to recover 616*l.* 18*s.* 4*d.*, claimed by plaintiff for his services as the engineer of a projected railway, called the Kentish Railway Company, of which the defendant was one of the provisional committee.

At a meeting of the provisional committee, on Aug. 12, 1844, at which plaintiff was present, one of the resolutions was: — "That the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the Company, and that no such responsibility shall attach to them." Another of the resolutions at the same meeting was: — "That it be a recommendation to the committee of management to endeavour to secure the valuable services of J. Locke, Esq., the eminent engineer, in addition to those of Colonel Landman, the original projector of the railway, it being clearly understood that neither of those gentlemen shall have any personal claim against any member of the provisional committee."

Oct. 11, 1844, plaintiff wrote to the solicitors of the Company: — "I never understood that, unless the project were successful, the engineers were to abandon all claim; but I did understand that the individuals comprising the committee were not to be held personally liable. I am perfectly ready to continue to devote my time and attention to the perfecting of the survey and getting up of the parliamentary documents, without making any charge for the same until sufficient funds may have been collected."

At a meeting of the committee of management, on Oct. 17, 1844, at which plaintiff was present, it was "Resolved, that Messrs. Lake & Co. be requested to forward the survey in such manner as may be found advisable, Colonel Landman [the plaintiff] stating that he would render every assistance in his power, and that he would make no claim for his personal services, or for those of his assistant, Mr. Pinhorn, until there should be sufficient funds of the Company to meet any demand he might be entitled to make."

At a meeting of the committee of management on Oct. 29, 1844, one of the resolutions was as follows: "And it appearing to the committee that it is absolutely necessary to provide a fund, in order that the surveys of the line may be immediately proceeded with, it was (on the motion of Mr. Entwistle) — Resolved, that the committee bind themselves to be answerable to the extent of 1000*l.*, to be applied to engineering and surveying purposes."

At a meeting, on Nov. 18, 1844, the committee resolved, that it is expedient that the Kentish Railway Company should withdraw from

[1] Statement abridged. Arguments omitted. — Ed.

CHAPTER III.

PARTNERSHIP PROPERTY AND THE INTEREST OF A PARTNER THEREIN.

SECTION I.

Whether a Partnership can hold the Legal Title to Property.

JAMES M. HOLMES *v.* JARRETT, MOON, & CO.

IN THE SUPREME COURT, TENNESSEE, FEBRUARY 14, 1872.

[*Reported in 7 Heiskell*, 506.]

FROM the Circuit Court, November Term, 1870, James E. Rice, J.

J. R. Hubbard, for plaintiff.

H. M. McAdoo, for defendants.

NICHOLSON, C. J., delivered the opinion of the court.

This is an action of ejectment, brought in the Circuit Court of Humphreys County, by Jarrett, Moon, & Co. against James M. Holmes. The plaintiffs obtained a judgment, from which defendant appealed in error.

The first ground relied on for reversal is error in the refusal of the circuit judge to charge the following proposition: —

"If the proof shows that Jarrett and Moon were partners, under the firm-name of Jarrett, Moon, & Co., and that the deed in this case was made to such firm, and not to the individual members of such firm, the jury should find for the defendant."

The principle of law is well settled that it is impossible for a partnership, as such, to hold the legal title of real estate. Only a person can do this, and a corporation only because it is a person in law; but this a partnership is not. Parsons on Partnership, 366. But, when a deed is made to a partnership, the legal title vests in such of the members of the firm individually as are named in the conveyance.

The legal title, so vested in one or more individual members of the firm, is held in trust for the partnership. Moreau *v.* Saffarans.[1]

If, then, it had appeared in proof in the present case that the deed on which plaintiffs relied conveyed the title to Jarrett, Moon, & Co., and if it also appeared that Jarrett, Moon, & Co. was a partnership,

[1] 3 Sneed, 599.

composed of Jarrett and Moon, and others not named or proven, it would follow that the legal title vested in Jarrett and Moon as trustees for the partnership, unless the fact that the given names of Jarrett and Moon were not proven rendered the deed void for uncertainty. We know of no authority for holding that a deed is void, if the given name of the grantee is omitted. An ambiguity of that kind may be explained by parol proof; and the parties intended to be designated as grantees thus made certain.[1] Ward *v.* Espy.[2]

But, as matter of fact, it does not appear in the bill of exceptions that there was any proof whatever showing that Jarrett, Moon, & Co. constituted a partnership, of which Jarrett and Moon were two members. Nor does it appear, from anything in the record, that Jarrett Moon is not an individual. It does appear throughout the record that there was more than one plaintiff; but this would appear as well if Jarrett Moon was only one person, as if the name designated two. As far as the record shows, the legal title of the land is in Jarrett Moon, and not in Jarrett and Moon.

Upon either ground, there is no error in the refusal of the court to give the charge.[3]

[1] Schumpert *v.* Dillard, 55 Miss. 348; Beaman *v.* Whitney, 20 Me. 413; Morse *v.* Carpenter, 19 Vt. 613, *accord.* See also Hoffman *v.* Putnam, 2 Brock. 156.

In Todd *v.* Rines (Minn. 1879), 9 C. L. J. 338, 10 C. L. J. 102, s. c., it was held that a deed of conveyance to Todd, Gorton, & Co. was wholly inoperative to pass the legal title from the grantor, but that the latter became thereby a trustee for the firm.

In the following cases a deed to a partnership by its firm name was held to convey the title only to the person whose name appeared in that of the firm: Gossett *v.* Kent, 19 Ark. 602 (John Gossett & Co.); Winter *v.* Stock, 29 Cal. 407 (Louis Blanchard & Co.); Moreau *v.* Saffarans, 3 Sneed, 595 (John L. Saffarans & Co.). — Ed.

[2] 6 Hum. 447.

[3] The remainder of the case, not relating to the law of partnership, is omitted. — Ed.

HENRY D. BASSETT AND OTHERS *v.* HENRY MILLER.

IN THE SUPREME COURT, MICHIGAN, JUNE 21, 1878.

[*Reported in* 39 *Michigan Reports*, 133.]

CAMPBELL, C. J.[1] This case presents, as we think, but one important question, and that is, whether surviving partners who sell goods which belong to their firm can recover for their price in their own names, without joining the representatives of the deceased partner. The principle is well settled that the entire legal estate vests in the survivors, and no one else can be regarded as having any legal interest in the assets.[2] Barry *v.* Briggs;[3] Pfeffer *v.* Steiner;[4] Merritt *v.* Dickey.[5]

The court erred in holding that the survivors could not sue for goods sold by them until they had an assignment or had formally organized a new firm.

The other questions are not very distinctly presented and need not be considered. There was evidence tending to show liability which the jury could consider.

Judgment must be reversed with costs, and a new trial ordered.

The other justices concurred.

[1] See *supra*, p. 24, note 1. — ED.

[2] Bohler *v.* Tappan, 1 Fed. Rep. 468; Andrews *v.* Brown, 21 Ala. 437 (*semble*); Strange *v.* Graham, 56 Ala. 614; Filley *v.* Phelps, 18 Conn. 301 (*semble*); Smith *v.* Wood, 31 Md. 293; Bush *v.* Clark, 127 Mass. 111; Barry *v.* Briggs, 22 Mich. 201; Pfeffer *v.* Steiner, 27 Mich. 537; Robertshaw *v.* Hanway, 52 Miss. 713; 49 Miss. 758, s. c. (*semble*); McCutchen *v.* Rice, 56 Miss. 455; Stearns *v.* Houghton, 38 Vt. 583, *accord*.

Wilson *v.* Soper, 13 B. Mon. 411 (*semble*); Stanhope *v.* Suplee, 2 Brewster, 455 (*semble*), *contra*. — ED.

[3] 22 Mich. 201. [4] 27 Mich. 537. [5] 38 Mich. 41.

spect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." I deem this provision most material; and, therefore, I will call your Lordships' particular attention to it. It forbids any claim in respect of a matter which arose more than six years before the action.

In the case that we are considering, the matter — viz., the dissolution of the partnership, and, consequently, the possession of the partnership property by the surviving partner — did arise more than six years before the commencement of this suit. The provision forbids that any action of account, the cause of which arose more than six years before suit, shall be considered as liable to be sued upon after such six years, "by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." The appellant here relies upon the claim against Hughes having been received and realized within six years before the commencement of the suit. The question is, Was that claim against Hughes, that debt due to the partnership, a thing comprised in the same account? An account of the partnership estate would unquestionably comprise that claim; and the statute was directed, as we all know, against the erroneous notion that an account which had been barred by the lapse of six years after the last entry in the account might be considered as opened and revived by the receipt of a subsequent sum of money more than six years after the date of the last entry. It removes that notion, provided the receipt after the six years is the receipt of an item comprised in the original account. The word "comprised" I construe as equivalent to "that would have been comprehended" in; that is, that would have been an item in the account demanded.

Here the right of action arose upon the death of Mr. Thistlethwayte, in December, 1854; and the cause of such action was the possession of the partnership estate by the surviving partner. The right to an account was, therefore, barred by the statute in the month of December, 1860. If, as an answer to the statute, the appellant intended to rely upon the receipt by Mr. Gye of the debt due to the partnership from Mr. Hughes, he should have alleged and proved that this sum was received within six years from the death of Mr. Thistlethwayte: but this he has not done; and it is to be inferred, from a paragraph in the bill (as is, in fact, stated by the answer), that the money was not received from Hughes until the month of June, in the year 1861. This sum was a matter that was comprised in the account demanded by the bill, that is to say, which would have been an item in that account if taken; and, there-

fore, if the right to the account was taken away by the statute previously to the receipt of such item, the subsequent receipt cannot remove the bar, and restore the title to the account.

That a court of equity will not, after the lapse of six years, without acknowledgment, decree an account between a surviving partner and the estate of a deceased partner has been long settled by various decisions. The rule, of course, must be the same where the parties are reversed, and the representative of the deceased partner is the plaintiff. The general principle was laid down as early as the case of Lockey *v.* Lockey,[1] where it was held that, where a court of equity assumes a concurrent jurisdiction with courts of law, no account will be given after the legal limits of six years, if the statute be pleaded. If it could be doubted whether the executor of a deceased partner can, at common law, have an action of account against the surviving partner, the result will still be the same; because a court of equity, in affording such a remedy and giving such an account, would act by analogy to the Statute of Limitations. For where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase that a court of equity acts by analogy to the Statute of Limitations, — the meaning being, that, where the suit in equity corresponds with an action at law which is included in the words of the statute, a court of equity adopts the enactment of the statute as its own procedure. But if any proceeding in equity be included within the words of the statute, there a court of equity, like a court of law, acts in obedience to the statute. I have no doubt, therefore, of the Statute of Limitations being a bar to the whole of the relief sought by the appellant as executor of Thistlethwayte.

Your Lordships will no doubt recollect that, in the observations I have made with regard to the adoption of the statute by a court of equity, I refer to those well-known expressions of Lord Redesdale,[2] in which he distinguishes between the cases where a court of equity acts in analogy to the statute and where it acts in obedience to the statute. Where a court of equity frames its remedy upon the basis of the common law, and supplements the common law by extending the remedy to parties who cannot have an action at common law, there the court of equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords.

In deciding this case, it must be recollected that the representative

[1] Prec. in Ch. 518.

[2] Hovenden *v.* Annesley, 2 Sch. & Lef. 630 *et seq.*

of a deceased partner has no specific interest in or claim upon any particular part of the partnership estate. The whole property therein accrues to the surviving partner; and he is the owner thereof, both at law and in equity. The right of the deceased partner's representative consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership.

Another source of error in this matter is the looseness with which the word "trustee" is frequently used. The surviving partner is often called a "trustee;" but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a partner, the law confers on his representatives certain rights as against the surviving partner, and imposes upon the latter correspondent obligations. The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner; but, when these obligations have been fulfilled or are discharged or terminate by law, the supposed trust is at an end.

The advantage of correcting, by familiar practice, an inaccurate use of a word, although that use may be found in treatises of reputation, I remember to have seen singularly illustrated in a case that occurred some years ago in a court of law, where the court of law was told that, in an agreement for the sale of a house, the vendor was trustee for the purchaser, and the judges were called upon to apply a rule which is quite right as between a complete trustee by declaration and the *cestui que trust*, but quite wrong where the vendor is called a trustee only by a metaphor, and by an improper use of the term; and it required some trouble to convince them that, though the vendor might be called a trustee, he was a trustee only to the extent of his obligation to perform the agreement between himself and the purchaser. In like manner here, the surviving partner may be called a trustee for the dead man, but the trust is limited to the discharge of the obligation, which is liable to be barred by lapse of time, — as between the express trustee and the *cestui que trust* time will not run; but the surviving partner is not a trustee in that full and proper sense of the word. It is most necessary to mark this again and again; for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee of all the consequences which would follow if he were a trustee by express declaration, — in other words, a complete trustee, — holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor. This is one of the sources of error in this case. The mistaken phrase that a surviving partner is a trustee, and that, therefore, no time can run as between him and the

SECTION III. (*continued*).

(o) THE INTEREST OF A DECEASED PARTNER DESCENDS AS PERSONALTY.

THORNTON [THOMPSON] v. DIXON.

IN CHANCERY, BEFORE LORD THURLOW, C., JANUARY 28, MARCH 18, 1791.

[*Reported in* 3 *Brown's Chancery Cases*, 199.]

JOSEPH DIXON, Thomas Horn, and James Sowter, in 1761, being seised in fee of some land called Broadmoor, entered into partnership for twenty-one years, as paper-makers, and mills were erected upon the land, and they declared the uses of the land to the use of themselves in fee, as tenants in common.

In 1764 they entered into another partnership for twenty-one years, by deed, taking in four new partners, Isaac Dixon, Jacob Dixon, Lancelot Dixon, and Joseph Crosthwaits, in different proportions; and in the partnership deed there was a covenant from the three original partners, to stand seised of the land, in trust for the copartnership, in the proportions in which they were respectively interested therein; and a proviso that, in case any of the partners wished to dispose of his and their shares, he or they might do so, giving notice to the other partners, in order that they might have an opportunity of purchasing. That partnership term expired, and they went on afterwards without any new agreement.

During the second partnership they bought a freehold messuage, with a little land adjoining, called Low Meerbeck, for the better carrying on the trade, which was enjoyed by the partners as joint tenants.

Joseph Dixon possessed, by purchase from the others, one-half of the whole concern, and died, leaving a widow, Barbara, who was his second wife, a son, Jacob, and a daughter, Ann, his children by his former wife.

The son carried on the trade as a partner, and received the profits till his death, and died leaving his sister Ann his heir, and she was admitted a partner, and died. The plaintiff, her husband, took out administration to her, and under a settlement made after his marriage, by which, in default of appointment of uses therein mentioned, the estate was limited to himself and his wife in fee, he claimed, as survivor, his wife's moiety in Broadmoor and Meerbeck.

The other partners had refused to pay him the profits of the concern, since his wife's death, but submitted to account as the court should direct.

The defendant, Barbara Dixon, widow of Joseph Dixon, claimed her dower in Broadmoor, and her share, under the custom of the province of York, of the husband's personalty, and also her distributive share under the statute; and defendant, Jonathan, the heir of Ann, claimed her real estate.

It was objected by the partners, defendants, that the settlement could give no right to the plaintiff in his wife's share, there having been no license or consent thereto by the other partners, pursuant to the clause in the deed of partnership.

The only question at the hearing was as to the equitable quality of Broadmoor and Meerbeck.

LORD CHANCELLOR said he had always understood that where partners bought lands for the purpose of a partnership concern, it was to be considered as part of the partnership fund; and that, consequently, Broadmoor and Meerbeck must be considered as personal estate, and distributable as such. And that, as the surviving partners were not bound to admit the representatives of a deceased partner, after the expiration of the term, to the partnership, the concern must be sold and divided, and distributed as personalty among the claimants, according to the rules of law.

It was suffered to stand over, for the partners to agree among themselves about selling the concern; and his Lordship gave liberty to argue the nature of the property, if his proposition on that point could not be maintained.

Upon the cause coming on again [18th March, 1791], Lord Chancellor thought that, had the agreement been that the mills should be valued and sold, it would have converted them into personalty of the partnership; but that the agreement in this case was not sufficient to vary the nature of the property; therefore, that after the dissolution the property would result according to its respective nature, the real as real,[1] the personal as personal, estate.[2]

[1] Bell *v.* Phyn, 7 Ves. 453; Balmain *v.* Shore, 9 Ves. 500; Randall *v.* Randall, 7 Sim. 271; Cookson *v.* Cookson, 8 Sim. 529, *accord.* — ED.

[2] Sir John Simeon's MS. note of the result on this occasion is as follows: —

"But afterwards, on the cause coming on again, Lord C. held that, as between the representatives of a person interested in the concern, the property should go according to its real nature, *i.e.* freehold to the heir, personal to executor, notwithstanding they are used together for the purposes of trade. The parties not having agreed, a sale was directed."

CHAPTER IV.

THE SEPARATE PROPERTY OF A PARTNER, AS AFFECTED BY THE PARTNERSHIP RELATION.

SECTION I.

Liability of the Separate Property of a Partner to Legal Process in an Action founded upon a Partnership Debt.

MEECH AND ANOTHER *v.* ALLEN.

IN THE COURT OF APPEALS, NEW YORK, JUNE, 1858.

[*Reported in* 17 *New York Reports*, 300.]

APPEAL from the Supreme Court. The complaint averred these facts: In May, 1847, the plaintiffs recovered a judgment against one Taylor, upon his sole and individual indebtedness, for $8,650.65, which was duly docketed, and became a lien upon his real estate. In 1848, Taylor died, seised of real estate in his own individual right, upon which said judgment was a lien. Taylor and one Hiram Pratt, who died in May, 1840, were, in their lifetime, partners in the business of common carriers upon the Erie Canal and the Great Lakes. A demand arose against them as such partners, which was in litigation when Pratt died, and upon which a judgment was recovered in the Supreme Court, and duly docketed, on the 13th May, 1842, against Taylor, as survivor of himself and Pratt, for $9,990.05; which judgment was assigned to and became the property of the defendant Allen after the death of Taylor and the recovery of the plaintiffs' judgment. In April, 1850, executions were issued upon both of the above-described judgments to the sheriff of Erie, who, in virtue thereof, on the 4th of June, 1850, sold certain parcels of the real estate in the city of Buffalo, whereof Taylor died seised in his own right.

The plaintiffs attended at the sale, and gave notice to the defendant of the facts stated, claiming that their judgment was entitled to priority, and that the money raised by the sale should be applied first to its satisfaction. The defendant became the purchaser at the sale. There is no other individual property of Taylor out of which the plaintiffs can obtain satisfaction of their judgment except the land thus sold, and there is sufficient estate of Hiram Pratt, deceased, to satisfy the judgment of the defendant.

The complaint prayed that the land might be resold and the proceeds first applied to the payment of the plaintiffs' judgment, or that the defendant pay to them so much of the proceeds of the sale already had as would extinguish their judgment, with the costs of this action. The defendant demurred, and had judgment in his favor, which was, on appeal, affirmed by the Supreme Court, at general term in the eighth district; whereupon the plaintiffs appealed to this court.

Solomon G. Havens, for the appellant.

Chauncey Tucker, for the respondent.

SELDEN, J. It is a settled rule of equity that, as between the joint and separate creditors of partners, the partnership property is to be first applied to the payment of the partnership debts, and the separate property of the individual partners to the payment of their separate debts; and that neither class of creditors can claim anything from the fund which belongs primarily to the opposite class until all the claims of the latter are satisfied. This, however, is a rule which prevails in courts of equity in the distribution of equitable assets only. Those courts have never assumed to exercise the power of setting aside or in any way interfering with an absolute right of priority obtained at law. In regard to all such cases the rule is *equitas sequitur legem*. 1 Story Eq. Jur. § 553.

In Wilder *v.* Keeler,[1] Chancellor Walworth says: "Equitable rules are adopted by this court in the administration of legal assets, except so far as the law has given an absolute preference to one class of creditors over another." So, in the case of Averill *v.* Loucks,[2] Paige, P. J., says: "Courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and recognize and enforce all antecedent liens, claims, and charges existing upon the property, according to their priorities." This is also conceded in the case of McCulloh *v.* Dashiell,[3] where the whole doctrine of the distribution in equity of the joint and separate property of partners is very elaborately examined. Archer, J., by whom the opinion of the court was delivered, there says: "At law, the joint creditors may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, which are at law considered joint and several, without the possibility of the interposition of any restraining power of a court of equity." But especially must it be beyond the power of such courts to interfere where an absolute right of legal priority is given by force of a positive statute, as in case of a judgment. Chancellor Walworth, in Mower *v.* Kip,[4] says: "The rule of this court is to give effect to the lien of a judgment upon a legal title, so far as it can be enforced by execution at law."

[1] 3 Paige, 171.
[2] 6 Barb. S. C. 470.
[3] 1 Har. & Gil. 96.
[4] 6 Paige, 88.

As there is no doubt that at law the judgment for a partnership debt attaches and becomes a lien upon the real estate of each of the partners, with the same effect as if such judgment were for the separate debt of such partner, it is obvious, from the preceding authorities, that the theory upon which the complaint in this case was drawn is erroneous. The principle that the separate property of an individual partner is to be first applied to the payment of his separate debts, has, as we have seen, never been held to give priority as to such property to a subsequent judgment for an individual over a prior judgment for a partnership debt. It is true, that courts of equity will sometimes give to a mere equitable lien, which is prior in point of time, a preference over a subsequent judgment; but this will be done only where such prior lien is specific in its character, as in the case of White *v.* Carpenter.[1] The mere general equity of the separate creditors to have their debts first paid out of the individual property of the partners does not amount to a lien at all, much less a lien of the kind necessary to give it a preference over a judgment for a partnership debt.

The plaintiffs cannot, under the averments in the complaint, avail themselves of that principle of equity which enables a creditor having a lien upon one fund only, to compel a creditor who has a lien not merely on the same fund, but also upon another, to resort first to the latter, to the end that both may be paid. If the complaint had averred that there was sufficient partnership property upon which the defendant's judgment was a lien, to satisfy such judgment, it is possible that, under the principle referred to, the plaintiffs might have been entitled to some relief;[2] and in that event it would not have been a valid objection to the complaint that it did not ask for the relief appropriate to the case. But the averment in the complaint is simply that there is sufficient estate of the deceased partner, Hiram Pratt, to satisfy the defendant's judgment.

This averment brings the case directly within the doctrine laid down by Lord Eldon in *Ex parte* Kendall.[3] He says: "If A. has a right to go upon two funds, and B. upon one, having both the same debtor, A. shall take payment from that fund to which he can resort exclusively, that by those means of distribution both may be paid. That takes place where both are creditors of the same person, and have demands against funds the property of the same person. But it was never said that if I have a demand against A. and B., a creditor of B. shall com-

[1] 2 Paige, 219.

[2] *Re* Lewis, 8 N. B. R. 546; *Re* Sandusky, 17 N. B. R. 452, *accord.*

But the separate partner cannot resist the application of his property to the satisfaction of a partnership debt, although the firm is abundantly solvent. Dean *v.* Phillips, 17 Ind. 406. — Ed.

[3] 17 Vesey, 520.

pel me to go against A. without more, as if B. himself could insist that A. ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all obligations arising out of these complicated relations may be satisfied. But if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded in some equity giving to B. the right, for his own sake, to compel me to seek payment from A."

The point has also been expressly decided in this State in the case of Dorr *v.* Shaw.[1] The only difference in principle between that case and this is, that there it did not appear that the joint debtors were partners. This, however, is a difference which operates against the claim of the plaintiffs here. Where two individuals, not partners, are jointly indebted, it might seem to be just to presume that each owed one-half the debt, and to that extent, therefore, there might be an equity in favor of the one owing an individual debt to have so much of the joint debt paid by his co-debtor. But in regard to partners, it is now well settled, upon an analogous question, that no such presumption can be indulged. Formerly, a judgment creditor of one of two partners might levy his execution upon property belonging to the firm; and, upon the presumption that the interests of the partners were equal, might proceed to sell and appropriate one-half the avails to the satisfaction of his debt. This, however, was long since overruled.

In the case of Dutton *v.* Morrison, Lord Eldon, in discussing this question, says: "It may be represented that the world cannot know what is the distinct interest of each (*i.e.* each partner), and therefore it is better that the apparent interest of each should be considered as his actual interest. But courts of equity have long held otherwise." He then lays down the rule, ever since acted upon, that the creditor in such a case must wait until the partnership accounts are settled before he can claim anything from the partnership property.

The principle here asserted by Lord Eldon is directly applicable to the present case. It is, that no inference can be safely drawn from the mere external relations of partners to the world, as to the situation of their affairs *inter se*, and that, in all judicial proceedings involving the latter, an investigation is first to be made; and such is the variety and frequent complexity of partnership dealings, that any other rule would obviously lead to gross injustice. It is impossible, therefore, in this case, to assume, without any averments on the subject in the complaint, that the estate of the deceased partner, Pratt, ought, in equity, to pay any portion of the defendant's judgment. Hence, upon the principles laid down by Lord Eldon, and universally acted upon by courts of equity, the complaint is clearly insufficient.

[1] 4 Johns. Ch. 17.

LEVI PIERCE v. GEORGE JACKSON.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1810.

[*Reported in* 6 *Massachusetts Reports*, 242.]

THIS was an action of the case against the defendant, a deputy sheriff of this county, for a false return of a writ of execution. It was submitted to the court upon an agreed statement of facts, which were recited by the Chief Justice in delivering the opinion of the court. An argument was had at the adjourned session in July last, by *Channing*, for the plaintiff, and *Sullivan*, for the defendant, after which the action was continued for advisement to this term.

PARSONS, C. J. It is stated in the case agreed by the parties, that Charles F. Kentor and Gerard Von Harten were partners in trade, doing business under the firm of Kentor & Von Harten; that, the partnership being insolvent, the partnership effects were duly attached by the defendant, at the suit of a creditor of the partnership, on the 28th day of March, 1806; that afterwards, on the same day, in the forenoon, the defendant again attached the same effects, at the suit of Messrs. Sheek & Foss, creditors of Von Harten only; that afterwards, on the same day, the defendant again attached the same effects at the suit of the plaintiff, brought against the partnership for a partnership debt; that judgments were recovered in these suits, and executions issued within thirty days thereafter; that, by the execution issued on behalf of the first attaching creditor, the effects were seized and regularly sold, and out of the proceeds that execution was satisfied; that a balance remained in the defendant's hands, claimed both by Sheek and Foss, and also by the plaintiff, but not sufficient to satisfy either of their executions; and that the defendant applied it to the execution sued out by Sheek & Foss, returning the plaintiff's execution in no part satisfied. And whether the defendant did right, or whether he ought to have applied the balance towards the plaintiff's execution, is the first question.

At common law, a partnership stock belongs to the partnership, and one partner has no interest in it, but his share of what is remaining after all the partnership debts are paid, he also accounting for what he may owe to the firm. Consequently, all the debts due from the joint fund must first be discharged, before any partner can appropriate any part of it to his own use, or pay any of his private debts; and a creditor to one of the partners cannot claim any interest but what belongs to his debtor, whether his claim be founded on any contract made with his debtor, or on a seizing of the goods on execution. There are sev-

eral cases by which these principles, so reasonable and equitable, are recognized and confirmed.

But it is said that our statutes authorizing attachments to be made on original writs, to secure such judgments as may on such suits be recovered, have, in this respect, altered the common law. Whatever goods are attached must be seized on execution within thirty days after judgment, or the lien arising from the attachment is gone. It seems, therefore, very clear that chattels which cannot lawfully be seized on execution cannot lawfully be attached; and as the right to seize chattels on execution remains as at common law, so must the right to attach by original writ depend on the common law; and therefore the right of attachment, given to creditors, can have no influence on this question.

When these principles are applied to the facts stated, the result is, that the officer has misapplied the balance in his hands, if the plaintiff be a creditor of the partnership; for it is agreed that the partnership was insolvent, and that no interest therein remained to either of the partners, after the debts of the company were paid. But the debt of Sheek & Foss was due, not from the firm, but from Von Harten, one of the partners. And the plaintiff's demand was a claim upon the partnership.

The defendant contends that there was no debt due from the company to the plaintiff, and that his judgment was obtained by fraud. On this point, the following facts are agreed in the case (if, on the trial, it was competent for the defendant to have given them in evidence): that the plaintiff's action was on a note made by the company to a third person, but not payable until several days after the plaintiff's writ was sued out, and the attachment by virtue of it was made; that the indorsement to him was a forgery by one of the company, and not made by the promisee; and that, after he had recovered judgment against the company, they released to him all errors.

If, upon these facts, the judgment appears to be fraudulent against creditors, any creditor on whom it is a fraud may give them in evidence; and if Sheek & Foss would be defrauded by it, the defendant, whom they have indemnified, may, in our opinion, give them in evidence.

A suit is sometimes commenced when the plaintiff well knows that no cause of action has accrued to him, but his object is to obtain security by attachment, in preference to other creditors who have causes of action. This attempt is against law, and a fraud on the other creditors, for whom some remedy ought to be provided. The debtor joining in the fraud, either to defend the suit or by releasing errors, cannot defeat the creditor of his legal right to attach. If, therefore, the plaintiff, when he caused the attachment to be made on his writ, had no cause of action, he cannot claim the benefit of his attachment against a

creditor having a good cause of action. And a creditor of one of the firm has a right to attach the partnership effects against all creditors whose demand is not upon the company.

But the plaintiff insists that, as the indorsement was a forgery by one of the partners, he immediately had a cause of action for money had and received against the firm, for the consideration he paid to obtain the indorsement.

This reasoning cannot be admitted; for, if he had no demand on the company by virtue of the indorsement, he could have none in consequence of the fraudulent indorsement; because a fraud committed by one of the partners shall not charge the partnership.

Whether, therefore, the return by the defendant is or is not true, the plaintiff has received no injury from it, and cannot maintain this action against the defendant.

If afterwards Sheek and Foss should be attached as trustees of Kentor & Von Harten, at the suit of a partnership creditor, it may then be determined whether they can hold this balance against a creditor of the company. *Plaintiff nonsuit.*[1]

[1] Clark *v.* Allee, 3 Harringt. 80; O'Bannon *v.* Miller, 4 Bush, 25; Howell *v.* Comm. Bank, 5 Bush, 93; Comm. Bank *v.* Wilkins, 9 Greenl. 28; Douglas *v.* Winslow, 20 Me. 89 (*semble*); Thompson *v.* Lewis, 34 Me. 167 (*semble*); Trowbridge *v.* Cushman, 24 Pick. 310 (see Cropper *v.* Coburn, 2 Curtis C. C. 465; Peck *v.* Shultze, 1 Holmes C. C. 28); Tappan *v.* Blaisdell, 5 N. H. 190; Linford *v.* Linford, 4 Dutch. 113 (*semble*); Crane *v.* French, 1 Wend. 311; Dunham *v.* Murdock, 2 Wend. 553; Eighth Bank *v.* Fitch, 49 N. Y. 539; Ryder *v.* Gilbert, 16 Hun, 163; Roberts *v.* Oldham, 63 N. C. 297; Overholt's Appeal, 12 Pa. 222; Coover's Appeal, 29 Pa. 9; Crawford *v.* Baum, 12 Rich. 75, *accord*, with the dictum in the principal case.

See also Wilson *v.* Conine, 2 Johns. 280.

In Massachusetts, the sheriff is guilty of a conversion if, at the time of levy, the execution partner has no beneficial interest in the firm property: Blanchard *v.* Coolidge, 22 Pick. 155 (*semble*); Cropper *v.* Coburn, 2 Curtis C. C. 465, 470, per Curtis, ...; Peck *v.* Shultze, 1 Holmes C. C. 28; whereas, in proceeding against real property, the sheriff is to regard merely the legal title. Peck *v.* Fisher, 7 Cush. 389–390. See also Ensign *v.* Briggs, 6 Gray, 329.

In Vermont, an attachment by a separate creditor of one partner takes precedence of a subsequent attachment by a creditor of the firm, if at the time of the first attachment the firm was solvent. Russ *v.* Fay, 29 Vt. 381 (*semble*); Willis *v.* Freeman, 35 Vt. 44.

In equity, the claims of the partnership creditors prevail over a prior levy of execution by a separate creditor of one of the partners: Aultman *v.* Fuller (Iowa, 1880), 14 West. Jur. 168; Ross *v.* Henderson, 77 N. C. 170; Washburn *v.* Bellows Falls Bank, 19 Vt. 278; and a partner may, of course, be a partnership creditor within that rule: Rainey *v.* Nance, 54 Ill. 29; Divine *v.* Mitchum, 4 B. Mon. 488; Bryant *v.* Hunter, 6 Bush, 75; Crooker *v.* Crooker, 52 Me. 267; Buchan *v.* Sumner, 2 Barb. Ch. 165. — Ed.

In re D. G. & W. H. CORBETT.

IN THE DISTRICT COURT, UNITED STATES, DISTRICT OF NEVADA, JULY 16, 1878.

[*Reported in* 5 *Sawyer*, 206.]

THIS is an order obtained by the assignee requiring the bankrupts to show cause why certain personal property should not be ordered to be delivered by them to the assignee.

The contest is in reference to certain articles of furniture which before the bankruptcy belonged to the "Corbett Brothers" as partners, and were used in a hotel kept by them, as hotel furniture. The bankrupts claim that they each have a right to an exemption of necessary household and kitchen furniture out of the partnership property. This right the assignee denies. Sect. 5045 of the R. S. excepts from the operation of the conveyance to the assignee exempt articles, they being the "property of the bankrupt," and the property exempt from execution by the law of Nevada, is property "belonging to the judgment debtor."

Lewis & Deal, for the assignee.

Jonas Seely, opposed.

HILLYER, J. The one consideration which, it seems to me, must lead to a decision of this case against the claim of exemptions made by the debtors is, that the property which they seek to hold as exempt is not property which, in the sense of the law, belongs to either of them. It is joint property in which neither has any other interest than his share of what remains after the partnership debts are paid, which in case of an insolvent firm is, of course, nothing.

In case of a dissolution, says Story, each partner holds the joint property clothed with a trust to apply it to the payment of the joint debts. Story on Part. sect. 360. The interest of each partner in the partnership property, as stated by Kent, is his share in the surplus after the partnership accounts are settled and all just claims satisfied. 3 Kent's Com. 37. One partner cannot pledge or sell partnership property for his own separate debt without the consent of his copartner. Rogers *v.* Batchelor.[1]

The property of an insolvent firm must first be applied to the payment of the joint debts; only the surplus can be reached by the separate creditors. Murill *v.* Neill.[2]

A purchaser under an execution against one partner has no claim until the partnership debts are paid, except on the separate interest of the individual partner in the residue. Gilmore *v.* Land Co.;[3] United

[1] 12 Pet. 221. [2] 8 How. 414. [3] 1 Pet. C. C. 460.

States *v.* Williams.[1] If the partnership is insolvent, no interest passes by such sale, for the partner himself is then entitled to nothing. Lyndon *v.* Gorham.[2] Since an execution against one partner secures no interest in the property of a bankrupt partnership, it must follow that one partner cannot have that property exempted from execution, which an execution cannot reach because others have a prior claim upon it.

There is no question in this case as to the right of partners, during the existence of the partnership, and while the business is going on, to convert partnership property into separate property, out of which each partner claims his individual exemption. This, when done in good faith, may perhaps be lawful. Allen *v.* Central Valley Co.[3] But here the exemption is claimed out of the joint effects after the partnership has been adjudicated bankrupt. By the bankruptcy the status of the property has become fixed, and it is no longer in the power of either partner, or both, to change it. Upon the bankruptcy an equitable lien attached in favor of the partnership creditors on the joint effects in the hands of the assignee. Tillinghast *v.* Champlin;[4] Story on Part. sect. 361. The result of this doctrine, that the partnership effects in the hands of the assignee are charged with a trust or equitable lien in favor of joint creditors, must be that the individual members have no separate interest whatever in the partnership property, because there is no possibility of any surplus. And whether we say that the joint creditors have an equitable lien or a *quasi* lien, worked out through the equities of the partners, the result is the same; for the jurisdiction of a court of equity to enforce the lien or trust may be invoked by the joint creditors, independently of the wishes or assent of the partners. Ketchum *v.* Durkee.[5] By whatever name called, it is a right of the joint creditors to have the joint property of the bankrupt firm devoted to the payment of their debts before any is taken by the individual partners as separate estate, or by individual creditors. The conclusion must follow that the individuals can claim no exemption out of the partnership estate. Neither member of this insolvent firm has any such interest in any particular article of partnership property that he can claim it as exempt, or that it can be set apart to him as property belonging to him.

There is, in my opinion, a very decided distinction between a case like this and one where the party claiming the exemption owns a definite share in a particular article of property as a tenant in common. In this latter case the claimant has something of which he is the owner, in the former he has not. The partner having only his separate interest in the surplus cannot sell or mortgage an undivided interest in a specific part. Morrison *v.* Blodgett.[6] The tenant in common being the owner

[1] 4 McLean, 236. [2] 1 Gal. 366. [3] 21 Conn. 130.
[4] 4 R. I. 173. [5] 1 Barb. Ch. 480. [6] 8 N. H. 338.

of a definite portion of the thing can sell or mortgage it, and can deal with it as owner.

The conclusion reached in this case is sustained by great weight of authority. The cases examined by which it is supported are: *In re* Hafer;[1] *In re* Price;[2] *In re* Blodgett & Sandford;[3] *In re* Handlin & Venny;[4] *In re* Tonne;[5] *In re* Stewart & Newton;[6] *In re* Boothroyd & Gibbs;[7] *In re* Sauthoff & Olson;[8] *In re* Croft Brothers;[9] *In re* Melvin & Fox;[10] Wright *v.* Pratt;[11] Russel *v.* Lemon;[12] Pond *v.* Kimball;[13] Guptil *v.* McFee;[14] and Kingsley *v.* Kingsley.[15] In Burns *v.* Harris,[16] it was held that a partner may have an exemption out of the joint estate, if the other partners consent, but not without.

The cases which are cited as sanctioning the exemption are: Anonymous;[17] *In re* Rupp;[18] *In re* Young;[19] *In re* McKercher *et al.*;[20] *In re* Richardson;[21] Radcliff *v.* Woods;[22] Stewart *v.* Bronson.[23] Of these authorities the first is a statement that Judge Hill of Mississippi district has written to a register that such exemption may be allowed. *In re* Rupp has been since overruled by the case of *In re* Tonne, *supra*. *In re* Young and *In re* Richardson are both decisions of the district court of Missouri; decisions of an able judge, but as is seen he stands almost alone in this matter. In Radcliff *v.* Woods, the horse, a half interest in which was claimed and allowed as exempt, is spoken of by the court as owned in common, and the claimant as part owner. If the horse was owned by the claimant and another, as tenants in common, the case is not in point.

Rule absolute.[24]

[1] 1 B. R. 147, qr. [2] 6 B. R. 400. [3] 10 B. R. 145.
[4] 12 B. R. 49. [5] 13 B. R. 170. [6] 13 B. R. 295.
[7] 14 B. R. 223. [8] 16 B. R. 181. [9] 17 B. R. 324.
[10] 17 B. R. 543. [11] 31 Wis. 99. [12] 39 Wis. 579.
[13] 101 Mass. 105. [14] 9 Kan. 35. [15] 39 Cal. 665.
[16] 67 N. C. 140. [17] 1 B. R. 187, qr. [18] 4 B. R. 25, qr.
[19] 3 B. R. 111. [20] 8 B. R. 409. [21] 11 B. R. 114.
[22] 25 Barb. 52. [23] 37 N. Y. 350.

[24] See, in addition to the cases cited by the court, Comm. Bank *v.* Corbett, 5 Sawy. 543; Till's Case, 3 Nebr. 261; Terry *v.* Berry, 13 Nev. 514; Gaylord *v.* Imhoff, 26 Ohio St. 317; Bonsall *v.* Comly, 44 Pa. 442; Clegg *v.* Houston, 1 Phila. 352; Chalfant *v.* Grant, 3 Lea (Tenn.), 118, *accord*.

Conf *Re* Sauthoff, 16 N. B. R. 181; *Re* Melvin, 17 N. B. R. 543; *Re* Bjornstad, 18 N. B. R. 282. — Ed.

consequently no judgment can be got against the corporation under the said 16th section of the act, for the judgment it contemplates is one requiring immediate payment.

There is no other part of the act under which such a judgment can be got.

We may conclude, therefore, that although the language of the 13th section of the act is broad enough to include all debts, yet that the 16th section of the act is such as to require this language to be so restricted that it shall not include such a debt as this; a debt which a corporation owes to one of its stockholders for the money received from him for his stock.

If dividends were due to the Rosses the case would be different. Dividends, there is little doubt, stand on the same footing as ordinary debts due from the corporation to its stockholders.

The judgment that is needed in such a case as the present is a judgment authorizing a sale of the stock. There is no law authorizing such a judgment in attachments or garnishments. 16 Ga. 437. There is a law making "bank and other stock subject to execution." *Cobb, Dig.* 511. But this law does not reach the present case.

We think, then, that this stock of the Rosses was not subject to this garnishment, and, therefore, that the Court erred in not dismissing the attachment.

It becomes useless to consider the other grounds of the motion.

Judgment reversed.[1]

PARKER ET ALS. *v.* BETHEL HOTEL CO. ET ALS.

1896. *Supreme Court of Tennessee.*[2]

APPEAL from Chancery Court of Maury County.

The Bethel Hotel Co. was incorporated, in 1880, under the general corporations act of 1875; and erected a building used partly for a hotel and partly for other purposes. Sept. 1, 1885, the Bethel Hotel Co. and Lucius Frierson conveyed to Mayes & Dodson the "hotel proper part" of the building, by deed signed "Bethel Hotel Company, W. D. Bethel, President; Lucius Frierson, Secretary and Treasurer; and Lucius Frierson." This conveyance was authorized by a vote of the stockholders at the last meeting ever held by them. No business seems to have been transacted by the corporation after this time. On or about Aug. 28, 1886, Frierson became the owner of all the stock of the company; but, both before and after that date, he pledged various shares as security for debts of his which are still outstanding. The stock so pledged was

[1] In almost all States there are now statutes providing methods whereby a creditor may attach, or levy on, shares of corporate stock owned by his debtor. — ED.

[2] The statement of facts is abridged from the opinion, contained in advance sheets furnished by the State Reporter. Portions of the opinion are omitted. — ED.

not transferred on the books of the company. He used the remainder of the building as his own up to Jan. 12, 1892, when he executed a deed in his own name, purporting to convey to Webster, in trust, the real estate owned by the Bethel Hotel Company and certain stock in that company. The purpose of this deed was to secure the payment of certain debts owing by Frierson, preferring one creditor and providing for *pro rata* payment of the others. Most of the creditors of Frierson who had loaned him money on the stock of the Bethel Hotel Co. were not provided for in the deed of trust. Parker *et als.*, creditors of Frierson and pledgees of said stock, filed a bill in equity, praying (*inter alia*) to annul the trust deed to Webster. The cause was heard before the Chancellor of Maury County, and afterwards before the Court of Chancery Appeals, from which the case was taken to the Supreme Court.

G. T. Hughes, *Fussell & Wilkes*, *W. S. Fleming, Jr.*, *Granbery, & Marks*, and *John T. Williamson*, for Parker.

Figuers & Padgett, *E. H. Hatcher*, and *W. J. Webster*, for Hotel Co.

J. C. BRADFORD, Sp. J. [After fully stating the facts and pleadings.] It may be regarded as settled, therefore, that the legal title to the property conveyed to defendant, Webster, was, at the date of that instrument, in the Bethel Hotel Company, where it had been, unquestioned and undisturbed, since 1880, the year of its incorporation and organization. Defendants insist that, although Frierson may not have been invested with the legal title, he, nevertheless, had such an equitable estate and interest as entitled him to sell and dispose of the property. In other words, that he was the real owner of the property, and, as such, had the absolute right to use or dispose of it.

This alleged equitable estate was not the creation of any deed or written contract, executed by the Bethel Hotel Company, or of any corporate act or resolution adopted by the stockholders or directors, which in terms referred to or defined it, but is rather the result and consequence of certain facts and conditions, the existence of which is affirmed by the defendants.

It is said that the Bethel Hotel Company, by the alienation of that part of its property built for and adapted to the uses and purposes of a hotel, deprived itself of the means of conducting a hotel business, and that, since 1885, the date of the sale to Mayes & Dodson, it had ceased to exercise its corporate franchises; that the stockholders, at the meeting held in September, 1885, passed a resolution, or agreed among themselves, that the corporation should go into liquidation, and that Lucius Frierson, being then the owner of all the capital stock of the corporation, became, in consequence, the equitable owner of all its property, with full power to use it or dispose of it in such manner as he might choose to do. The position of the defendants seems to be that all rights of the corporation in the property were extinguished, that it had ceased to be affected with any corporate uses, and that it belonged absolutely to Frierson.

The facts affirmed by defendants are not all of them exactly as found by the Court of Chancery Appeals. It is true that the corpora-

tion sold and conveyed the hotel part of its building to Mayes & Dodson, retaining only the stores and opera house, and never afterwards engaged in the business of owning and operating a hotel. Lucius Frierson was not the sole stockholder in 1885, when the hotel was sold, and did not become such until August 28, 1886, when he purchased the Bethel stock. His stock, or a large part of it, at that time and subsequently, was held as collateral security by other parties. It is not true that a resolution was ever adopted by the stockholders directing the liquidation or winding up of the affairs of the corporation, or that they were ever wound up. The facts, as found by the Court of Chancery Appeals on this point, are stated in its opinion in the following words: "It may be fairly inferred, though it does not distinctly appear in terms in the proof, that when the deed was made to Mayes & Dodson it was then understood between W. D. Bethel and Lucius Frierson, they then owning practically all, or nearly all, of the stock, that Bethel should take the proceeds of the sale to Mayes & Dodson, amounting to $22,500, and a sufficient amount, in addition, from Lucius Frierson, personally, to make $30,000, and for this he would transfer his stock, $61,000, to Frierson, and that this arrangement was consummated, so far as it could be done without direct corporate action of the corporation itself, by the paper of August 28, 1886, made by Bethel to Frierson, and this is what they understood by the resolution to go into liquidation, there being no debts due by the corporation, and, following out this idea, from the date of the sale to Mayes & Dodson, Lucius Frierson proceeded to treat the property as his own, on the idea that he himself constituted the corporation. We do not think that he entertained the idea that the corporation was defunct, but simply that he was, himself, the corporation, and could do what he wished with the assets."

In considering the position of the defendants, that Frierson became the equitable owner of the assets of the corporation, we must, therefore, leave out of view the idea that there was any corporate action looking to a dissolution of the corporation and winding up of its affairs. Frierson's estate or interest in the property, if he had any, rests on the postulate that, in consequence of the nonuser of its franchises and his sole proprietorship of all its capital stock, the corporation was dissolved, and he became the equitable owner of all its property.

A corporation can be dissolved, and its existence wholly terminated, only by the extinguishment of the corporate franchises conferred by the State. An ordinary business corporation, where its charter specifies no definite time for its continuance, may sell its property and wind up its affairs whenever a majority of the stockholders may deem it advisable (*Treadwell* v. *Salisbury Mfg. Co.*, 7 Gray, 393; *Black* v. *Delaware & C. Canal Co.*, 22 N. J. Eq., 416); but the franchises conferred upon the stockholders by the State are not extinguished by the cessation from business thus brought about. 2 Morawetz on Corp., § 1004.

. . . . . .

It is claimed by the defendants that the dissolution of the corporation was effected by the fact that Lucius Frierson became the sole owner of all its capital stock. Admitting it to be true that he was the owner of all the stock of the corporation, it by no means follows that the corporation was thereby dissolved and forfeited its franchises. On this question the latest text writer on corporation law has this to say, viz.: "Contrary to early opinion, it is now generally held that the fact that all the shares in a joint stock company have passed into the hands of two members, or even into the hands of a single person, does not, *ipso facto*, work a dissolution of the corporation, since such sole owner may so dispose of the shares, as, by the election of the necessary directors and officers, to continue the corporate existence." 5 Thompson's Commentaries on the Law of Corporations, Sec. 6653. And, in 2 Morawetz on Corporations, Sec. 1009, it is said: "It is well settled that all the shares of a corporation may be held by a single person, and yet the corporation continue to exist, and, if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons, so as to conform to the letter of the rule." It has been held that a corporation which has sold all its assets, with the intention of putting an end to its business, whose officers had all resigned, and whose stockholders had all transferred their shares to a single person, was, nevertheless, not dissolved, and that its existence could be terminated only by judgment of forfeiture or by surrender accepted by the State. *Russell* v. *McLellan*, 14 Pick. (Mass.), 69, 70; *Newton Mfg. Co.* v. *White*, 42 Ga., 148; *Baldwin* v. *Canfield*, 26 Minn., 43.

The dissolution of a pecuniary or business corporation is effected in one of the following ways, viz.: (1) by the expiration of its charter; (2) by Act of the Legislature, where power is reserved for that purpose, or there is no constitutional inhibition; (3) by surrender of charter which is accepted; (4) by forfeiture of the franchises and judgment of dissolution pronounced by a Court having jurisdiction. 2 Morawetz, Sec. 1004; Taylor on Private Corporations, Sec. 430. It is not pretended that the Bethel Hotel Company was dissolved in either of the ways indicated. The charter of the corporation has not expired, neither has it been repealed by the Legislature, or been surrendered to the State by its members or stockholders. It may be true that there was a nonuser of its franchises by the corporation for a period of seven years or more, occasioned by the sale of the only property it owned which could have been used for hotel purposes. Undoubtedly the nonuser of its franchises by a corporation is ground for dissolution and forfeiture of its charter, at the instance of the State; but until sentence of dissolution has been pronounced by a Court of competent jurisdiction, in a proper proceeding instituted for the purpose, the corporation will continue to exist, notwithstanding its failure to use its franchises. And forfeiture can only be decreed in a proceeding directly instituted for the purpose, by the State granting it. Code (M. & V.) § 1712; *State* v. *Butler*, 15 Lea, 104, 110; *Jersey*

City Gaslight Co. v. *Consumers' Gas Co.*, 40 N. J. Eq., 427; *Broadwell* v. *Merritt*, 87 Mo. 95. Until dissolution has been thus judicially pronounced, neither the existence of the corporation or its title to its property can be questioned collaterally.

We are bound to conclude, therefore, that the Bethel Hotel Company was not dissolved, or its franchises extinguished for any of the reasons alleged by the defendants, and that it is now a corporation endued with life, with authority to own property and exercise all the powers conferred on it by its charter.

Defendants insist that the alleged equitable estate of Lucius Frierson in the property of the Bethel Hotel Company, did not depend alone upon the dissolution of the corporation, but resulted also from the fact that he was the sole owner of all its capital stock. The proposition is, that if one person owns all the shares of stock of a corporation which owes no debts, he, in virtue of such ownership, becomes the equitable owner of all its property, or, at least, may sell and dispose of it by deed, if he choose to do so. This proposition is argued by counsel for defendant with force and ability, and is supported by some authority. It has found favor with the Supreme Court of Maryland (*Swift* v. *Smith*, 65 Md., 428, 433); but the decision of that learned Court is opposed by the current of authority, and seems to us to overlook and ignore certain principles that are fundamental.

A corporation and its shareholders are distinct legal entities. In *Keith* v. *Clark*, 4 Lea, 718, this Court held that, notwithstanding the State owned all the stock in the Bank of Tennessee, "the bank and the State are entirely different legal entities," and, in *Lillard* v. *Porter*, 2 Head, 175, it was said, "stockholders are totally distinct from the corporation." Important consequences result from this rule. The shareholders are neither responsible for the debts nor for the torts of the corporation. In the absence of special circumstances, the shareholders cannot be parties, either plaintiffs or defendants, in actions respecting corporate rights, nor have they any title or direct interest in the property of the corporation.

"Shareholders," says Thompson, "are not joint tenants or in any other sense co-owners of the corporate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation. A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for debts of the corporation." Commentaries on the Law of Corporations, Sec. 1071. As the shareholders have no direct interest in the corporate property, they cannot convey the real estate of the corporation, though all join in the deed.

In *Wheelock* v. *Moulton*, 15 Vt. 519, Redfield, J., stated the reasons for the rule in his usual clear and accurate style. In that case, Moulton and Hutchinson, sole proprietors and owners of all the stock of a corporation, conveyed its real estate, in mortgage, to secure the repay-

ment of money borrowed of the plaintiff, Wheelock. He brought suit to enforce his mortgage. Judge Redfield said: "The fact that the signers of this deed owned the whole of the shares will make no difference in regard to the necessity of a vote of the corporation, in order to convey the land. The title to the land was in the corporation, not in the individual shareholders. The deed of one, or of any number of the stockholders, will not affect the title to the land. The share owners are not tenants in common of the land. They have no title whatever to any of the property of the corporation. It is true that one who owned all the shares might control the corporation, and so he could if he owned a majority of the shares; but he could, in either case, do it only by a vote of the corporation, at a meeting held in strict accordance with the statutes of the corporation."

And in *Humphreys* v. *McKissick*, 140 U. S. 304, Mr. Justice Field, discussing the same question, said: "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation — the artificial being created — holds the property, and alone can mortgage or transfer it, and the corporation acts only through its officers, subject to the conditions prescribed by law."

A very instructive case on this question is *Baldwin* v. *Canfield*, 26 Minn., 43. The facts of that case were very similar to those of this case, and the direct question now under consideration was passed upon. The opinion of the court was in accord with the cases above cited. See also *Button* v. *Hoffman*, 61 Wis., 20.

We are thus led, both by reason and authority, to the conclusion that Lucius Frierson, as sole stockholder of the Bethel Hotel Company, had no title, legal or equitable, to its property. The title to the property was in the Bethel Hotel Company, and could only be conveyed by it. The conveyance of its real estate is one of the most solemn acts of a corporation, and it can only be done in pursuance of a vote of the corporation, and by deed executed in the form and mode prescribed by law. Thompson's Commentaries on the Law of Corporations, Sec. 5096. At common law a corporation could not execute a deed to realty except under seal; and the general corporations Act of 1875, under which the Bethel Hotel Company was organized, provides that, if the corporation have no seal, it shall be bound by the signature of its name by a duly authorized officer.

To have made a valid conveyance of the real estate of the company, it was necessary, therefore, that the deed should have been executed in the name of the corporation, under seal, if it had one, and, if not, its name should have been signed by an agent duly authorized by its governing agency, its board of directors. *Garrett* v. *Belmont Land Co.*, 94 Tenn., 460. As we have seen, nothing of this kind was done. The deed to defendant, Webster, was executed by Lucius Frierson, in his own name and under his own signature. The Bethel Hotel Company, although it owned the property, was in no sense a party to it.

For this and other reasons given, the deed of Lucius Frierson, conveying the real estate of the Bethel Hotel Company to defendant, W. J. Webster, was void, and conveyed to him no title or interest therein.

We have assumed as a fact, in the preceding discussion, that Lucius Frierson was, in truth, the sole owner of all the shares of stock of the Bethel Hotel Company at the date he executed the deed to Webster. But was he?

[The Court then *held* that the pledgees of the stock acquired title thereto, even though they took with notice of a by-law of the company that no transfer should be effectual unless made on the books of the company.]

BUNDY *v.* OPHIR IRON CO.

1882. 38 *Ohio State*, 300.[1]

THE Ophir Iron Company was a corporation consisting of ten stockholders, including the plaintiff, Bundy.

Bundy indorsed notes of the Company upon an agreement that he should be protected by a mortgage upon the Company's real estate.

The mortgage, instead of being executed in the name of the Company as grantor, was, by mistake, executed in the name of the other nine stockholders, thus : —

"Know all men by these presents, that Robert Hoop" [and eight others then named], "the grantors in this instrument, and who together with H. S. Bundy are the sole members and stockholders in the Ophir Iron Company, a corporation duly organized, . . . in consideration of ten thousand dollars paid by said H. S. Bundy to said Ophir Iron Company, . . . do hereby grant . . . to the said H. S. Bundy, . . . all the right, title, interest and estate, legal and equitable, of the aforesaid grantors in and to the following lands and tenements of the said Ophir Iron Company, . . ."

[Then follows the condition that the deed shall be void if the Company shall pay the notes indorsed by Bundy, and shall save Bundy harmless.]

This mortgage deed is signed with the individual names and sealed with the individual seals of the nine persons named as grantors, by whom, as grantors, it is also acknowledged as their voluntary act and deed. It was recorded Dec. 5, 1874.

On April 17, 1875, a second mortgage, on the same premises, was duly executed by the corporation, through its president, to secure all its creditors except Bundy. The latter mortgage recites that it is made "subject, however, to a mortgage in favor of Hezekiah S. Bundy, for the sum of $10,000, of record in said County," &c.

[1] Statement abridged. Arguments and part of opinion omitted. – ED

In May, 1875, various creditors of the corporation (who were also mortgagees in the second mortgage) obtained judgments against it, which took effect as liens upon the lands described in the mortgages.

In August, 1875, Bundy, having paid the notes which he had indorsed, commenced an action to foreclose his mortgage, making various creditors of the corporation parties. The District Court found that the mortgage of Bundy was invalid as against the subsequent creditors of the Company.

Bundy brought error.

W. W. Johnson, with whom were *John T. Moore*, *Porter Du Hadway*, and *J. B. Foraker*, for plaintiff in error.

Wilby & Wald, and *C. A. Atkinson*, for certain creditors.

WHITE, J. The controversy in this case is between Bundy, claiming as first mortgagee, subsequent judgment creditors, and creditors claiming under the second mortgage.

Two questions arise for consideration: (1) Whether the execution and record of the mortgage of December 5, 1874, to Bundy, give him priority? and, (2) If not, does the recognition of the first mortgage in the second, of April 17, 1875, have that effect?

As to the first question: The consideration upon which Bundy indorsed the notes as surety of the corporation, was that the latter should give him a mortgage upon its property, conditioned that it would pay the notes at maturity, and save him harmless on account of his indorsements. The execution by the stockholders of the first mortgage was the attempted fulfilment of the agreement on the part of the corporation.

The Ophir Iron Company was incorporated under the act of April 12, 1858, providing for the creation and regulation of manufacturing companies. S. & C. 301, 304. Under that act the directors of the company are required to be stockholders; and while it is declared "the directors shall have the general management of the affairs of the company," yet they are made "subject always to the control of the stockholders" in reference to such management.

The mortgage to Bundy now in question, not being made in the name of the corporation, cannot, as against it, be regarded as a legal mortgage; but it is a good, equitable mortgage against the corporation. And if such direction were necessary, it might be considered as equivalent to a direction by the stockholders to the proper officers to make a mortgage in the name of the corporation to Bundy. But such direction was not necessary from the stockholders. The directors, under the agreement by which they obtained Bundy's indorsements of the notes of the corporation, were bound to secure him by the mortgage of the corporation. This they failed to do, by sheer mistake, in the form of executing the mortgage, which it was competent for a court of equity to correct; and which it was their duty to correct without the action of the court. *Clayton* v. *Freet*, 10 Ohio St. 544.

If it were not for our statute on the subject of mortgages, this equi-

table mortgage would prevail over all lien-holders and other claimants, except *bona fide* purchasers, for value. But it has been held, in a long series of decisions, that a mortgage has no effect, under the statute, either in law or equity, as against subsequently acquired liens, until its execution according to the statute, and its delivery to the recorder of the proper county for record. *Strang* v. *Beach*, 11 Ohio St. 283; *Bercaw* v. *Cockerill*, 20 *Id.* 163.

But such execution and delivery for record are not required as between the original parties or their heirs. *Bloom* v. *Noggle*, 4 Ohio St. 45; *Sidle* v. *Maxwell*, *Id.* 236.

The second question is: Does the recognition of the first mortgage in the second have the effect to give it priority?

We think this question must be answered in the affirmative. The second mortgage was executed in due form by the corporation, and was made expressly subject to the mortgage to Bundy. Hence, all subsequently acquired liens that are subject to the second mortgage are necessarily also subject to the first. *Coe* v. *Railroad Co.*, 10 Ohio St. 374; *Bercaw* v. *Cockerill*, 20 *Id.* 166.

It is, however, claimed on behalf of some of the judgment creditors that the second mortgage was not accepted by the mortgagees.

[After overruling this objection, the opinion proceeds as follows]:

Whether Bundy does not stand in such relation to the second mortgage, as to entitle him to insist upon it, both as against the corporation and the subsequent judgment creditors, without reference to its acceptance, may admit of question. But it is a question that need not now be considered. Upon the case as made in the record, the court erred in denying to Bundy the priority to which he was entitled. The judgment must therefore be reversed; and the cause is remanded for further proceedings. *Judgment accordingly.*

BUTTON *v.* HOFFMAN.

1884. 61 *Wisconsin*, 20.

APPEAL from the Circuit Court for Jackson County.

Replevin. The facts sufficiently appear from the opinion. The defendant appealed from a judgment in favor of the plaintiff.

C. J. Ainsworth and *S. U. Pinney*, for appellant.

Carl C. Pope, for respondent.

ORTON, J. This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer.

In his instructions to the jury the learned judge of the Circuit Court said: "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property

CHAPTER XXIV.

RIGHT OF CORPORATE CREDITOR TO COMPEL SHAREHOLDER TO PAY THE FULL PAR VALUE OF HIS STOCK. RIGHTS OF SHAREHOLDERS *INTER SESE* TO COMPEL SUCH PAYMENT.

SAWYER *v.* HOAG.

1873. 17 *Wallace* (*U. S.*), 610.[1]

APPEAL from the U. S. Circuit Court for the Northern District of Illinois.

Bill in equity by Sawyer against Hoag, assignee of the Lumberman's Insurance Company of Chicago, to enforce an alleged right of set-off. In 1865 the company was incorporated and authorized to begin business on a capital of $100,000, of which not less than one-tenth should be paid in, the residue to be secured. The directors stated to most of those invited to subscribe that only 15 per cent would be required to be paid down in cash, and that the remaining 85 per cent would be lent back to the subscriber, and a note taken therefor payable in five years, with seven per cent interest, secured by collateral. In 1865 Sawyer, upon the above understanding, subscribed for fifty shares of the par value of $100 each. He gave his check to the company for $5000, and his note payable to it in five years for $4250 (85 per cent of the par value of the stock) with interest; delivered to the company satisfactory collateral security; and received from the company a check for $4250, by way of, and as for a loan thereof, from the company. He also gave the company authority to sell the securities in case of default in payment of the note or the interest thereon.

Subsequently Sawyer took up the above note, and gave in substitution another note.

The original transaction was treated by the company and by Sawyer as a loan by the company to him, and his stock was treated as fully paid for. At various times after the giving of the note, the company reported to the authorities of the State of Illinois and of other States that its capital stock was fully paid.

[1] Statement abridged. Arguments omitted. — ED.

In October, 1871, the company was rendered insolvent by the great fire in Chicago.

In January, 1872, Sawyer, having then good reason to believe that the company was insolvent, purchased of one Hayes, for 33 per cent of its par value, a certificate of an adjusted loss for $5000 against the company.

In June, 1872, a petition in bankruptcy was filed against the company; and, it having been adjudicated a bankrupt, Hoag was appointed its assignee.

Hoag demanded of Sawyer payment of the note for $4250. Sawyer insisted that, under Section 20 of the Bankrupt Act, he had a right to set off the certificate of adjusted loss for $5000. Hoag refused to allow the set-off, and was about to sell the collateral securities in accordance with the authority given by Sawyer to the company. Thereupon Sawyer filed the present bill to enforce the set-off; alleging, among other things, that the note given by him to the company was for money lent to him. The assignee, in his answer, denied that the note was for money lent, and averred that it was in fact for a balance due by Sawyer for his stock subscription which had never been paid.

The case was submitted to the court below on an agreed statement of facts. That court decreed against the complainant, Sawyer, who appealed to this court.

D. L. Storey, and *C. Hitchcock*, for appellant.

J. N. Jewett, for appellee.

MILLER, J. The first and most important question to be decided in this case is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription.

The charter under which the company was organized authorized it to commence business upon a capital stock of $100,000, with ten thousand paid in, and the remainder secured by notes with mortgages on real estate or otherwise. The transaction by which the appellant professes to have paid up his stock subscription is, shortly, this: He gave to the company his check for the full amount of his subscription, namely, $5000. He took the check of the company for $4250, being the amount of his subscription less the 15 per cent. required of each stockholder to be paid in cash, and he gave his note for the amount of the latter check, with good collateral security for its payment, with interest at 7 per cent. per annum. The appellant and the company, by its officers, agreed to call this latter transaction a loan, and the check of the appellant payment in full of his stock; and on the books of the company, and in all other respects as between themselves, it was treated as payment of the subscription and a loan of money. It is agreed that at this time the current rate of interest in Chicago was greater than 7 per cent., and it is not stated as a fact whether these checks were ever presented and paid at any bank, or that any money

was actually paid or received by either party in the transaction. It must, therefore, be treated as an agreement between the corporation, by its officers, on the one part, and the appellant, as a subscriber to the stock of the company, on the other part, to convert the debt which the latter owed to the company for his stock into a debt for the loan of money, thereby extinguishing the stock debt.

Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other if it was found to be mutually convenient to do so. And in any controversy which might or could grow out of the matter between the insurance company and the appellant we are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full.

And on this consideration one of the main arguments on which the appellant seeks to reverse the decree stands. He assumes that the assignee in bankruptcy is the representative alone of the corporation, and can assert no right which it could not have asserted. The weakness of the argument is in this assumption. The assignee is the representative of the creditors as well as the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights, and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors of the bankrupt.

Had the creditors of this insolvent corporation any right to look into and assail the transaction by which the appellant claims to have paid his stock subscription?

Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.

The principle is fully asserted in two recent cases in this court, namely, *Burke* v. *Smith*,[1] and in *New Albany* v. *Burke*.[2] Both these cases turned upon the doctrine we have stated, and upon the necessary inference from that doctrine, that the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.

In the latter case, a judgment creditor of an insolvent railroad com-

[1] 16 Wallace, 390. [2] 11 Id. 96.

pany, having exhausted his remedy at law, sought to enforce this principle by a bill in chancery against the stockholders. The court, by affirming the right of the corporation to deal with the debt due it for stock as with any other debt, would have ended the case without further inquiry. But asserting, on the contrary, to its full extent, that such stock debts were trust funds in their hands for the benefit of the corporate creditors, and must in all cases be dealt with as trust funds are dealt with, it was found necessary to go into an elaborate inquiry to ascertain whether a violation of the trust had been committed. And though the court find that the transaction by which the stockholders had been released was a fair and valid one, as founded on the conditions of the original subscription, the assertion of the general rule on the subject is none the less authoritative and emphatic.[1]

In the case before us the assignee of the bankrupt, in the interest of the creditors, has a right to inquire into this conventional payment of his stock by one of the shareholders of the company; and on that inquiry, we are of opinion that, as to these creditors, there was no valid payment of his stock by the appellant. We do not base this upon the ground that no money actually passed between the parties. It would have been just the same if, agreeing beforehand to turn the stock debt into a loan, the appellant had brought the money with him, paid it, taken a receipt for it, and carried it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction which forbids it to be treated as valid payment. It is the change of the character of the debt from one of a stock subscription unpaid to that of a loan of money. The debt ceases by this operation, if effectual, to be the trust fund to which creditors can look, and becomes ordinary assets, with which the directors may deal as they choose.

And this was precisely what was designed by the parties. It divested the claim against the stockholder of its character of a trust fund, and enabled both him and the directors to deal with it freed from that charge. There are three or four of these cases now before us in which precisely the same thing was done by other insurance companies organized in Chicago, and we have no doubt it was done by this company in regard to all their stockholders.

It was, therefore, a regular system of operations to the injury of the creditor, beneficial alone to the stockholder and the corporation.

We do not believe we characterize it too strongly when we say that it was a fraud upon the public who were expected to deal with them.

The result of it was that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of deferred instalments properly secured.

It is said by the appellant's counsel that conceding this, it is still a

[1] See also Curran v. State of Arkansas, 15 Howard, 304; Wood v. Dummer, 3 Mason, 305; Slee v. Bloom, 19 Johnson, 456, and numerous other cases cited by the counsel for the appellees.

debt due by him to the corporation at the time that he became the owner of the debt due by the corporation to Hayes, and, therefore, the proper subject of set-off under the twentieth section of the Bankrupt Act. That section is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.

The debts must be mutual; must be in the same right.

The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.

It is unnecessary to go into the inquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or the effect of the bankruptcy proceeding. The result would be the same if the corporation was in the process of liquidation in the hands of a trustee or under other legal proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could not be applied exclusively to the payment of one claim, though held by the stockholder who owed that amount on his subscription.

Nor do we think the relation of the appellant in this case to the corporation is without weight in the solution of the question before us. It is very true, that by the power of the legislature there is created in all acts of incorporation a legal entity which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, make loans to them, and in insurance companies, make contracts of insurance with them, in all of which both parties are bound by the ordinary laws of contract. The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be

subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him.[1]

These principles require the affirmation of the decree in the present case, and it is accordingly *Affirmed.*

Mr. Justice HUNT dissented, holding that the transaction was a loan by the company to the appellant.[2]

IN RE GREAT NORTHERN AND MIDLAND COAL CO. CURRIE'S CASE.

1862. 3 *De Gex, Jones, & Smith*, 367.[3]

APPEAL by Currie and four other persons from an order in the winding-up of the company, placing them on the list of contributories, and making a call upon them in respect of certain classes of shares held by them.

The appellants held 100 shares transferred to them by one Butcher, which were originally allotted to him as paid-up shares in part of the consideration of property purchased by the directors from him. The appellants were also holders of other paid-up shares taken by them for attendance fees as directors. The validity of the purchase by the company from Butcher was in dispute; as was also the legality of the payment of attendance fees without the sanction of a general meeting.

Daniel and *Hardy*, for appellants.

Bacon and *Roxburgh*, for the official liquidator.

THE LORD JUSTICE TURNER.

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[1] Lawrence *v.* Nelson, 21 New York, 158.

[2] "Suppose every stockholder of an insolvent corporation had a claim against it equal to the amount of his unpaid subscription, and that there were other creditors holding claims to a much larger amount than those held by all the stockholders. If the stockholders could set off their claims against the amounts due by them upon their unpaid subscriptions, no other creditor would get a cent upon his claim. This would give a preference to those whose acts caused the insolvency of the corporation, over those who had no control in its management, and were in no respect chargeable with its failure." GARY, J., in *Efird* v. *Piedmont, &c., Co.*, A. D. 1899, 55 South Carolina, 78, p. 87. See also *Richardson* v. *Merritt*, A. D. 1899, 74 Minnesota, 354, p. 362, and *First Nat. Bank* v. *Riggins*, A. D. 1899, 124 North Carolina, 534.

But see the reasoning of Prof. Pepper, to show "that a right to set-off would exist in favor of a stockholder-creditor, even upon the trust theory." 34 Am. Law Register, N. s., p. 454. — ED.

[3] Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — ED.

These shares were allotted to *Butcher* under the authority given by the articles as paid-up shares in part of the consideration of the purchase made by the directors from him. That purchase was either valid or invalid. If valid it is clear that neither he nor his alienees can be called upon to contribute in respect of these shares. If invalid, I cannot see my way to hold that either a Court of law or a Court of equity could do more than treat the purchase as void, and undo the transaction altogether. It could not, as I apprehend, be competent either to a Court of law or to a Court of equity to alter the terms of the purchase, and treat as shares not paid-up shares which were given as paid-up shares in part consideration of the purchase. Fraud, assuming there was fraud, would of course warrant the Court in treating the purchase as void, or in undoing it; but it could not, as I conceive, authorize any Court to substitute other terms.

As to the shares taken for attendance fees, I am also of opinion that the Appellants are not liable to contribute in respect of those shares. They were taken, and, as it seems to me, improperly taken, as paid-up shares, but the same principles which apply to the 100 shares apply, as I think, to these shares also. The transaction might be undone but could not be modelled.

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SCOVILL *v.* THAYER.

1881. 105 *U. S.* 143.[1]

ERROR to U. S. Circuit Court for the District of Massachusetts.

The defendant was the holder of 285 shares of the first two issues of stock of the Fort Scott Coal and Mining Company, a corporation organized under the General Laws of Kansas. The par value was $100 per share. On 200 of defendant's shares he paid only $20 per share; and on the remaining 85 shares he paid only $40 per share. By agreement made at the date of the several issues of stock, the amounts paid thereon were credited to the subscribers, and the balance unpaid credited by "discount," and certificates as for full-paid shares were delivered to the subscribers, and the stock account between the company and them balanced by such "discount." In April, 1874, the company was adjudicated a bankrupt in the U. S. District Court for Kansas; and plaintiffs were appointed assignees. In 1876, in accordance with an order of the U. S. District Court, the assignees made an assessment upon the stock of the company of 76 per cent, upon which should be credited to each stockholder any sums paid by him on his shares.

[1] Statement abridged. Portions of opinion omitted. — ED.

COIT v. GOLD AMALGAMATING CO.

1886. 119 *U. S.* 343.[1]

APPEAL from U. S. Circuit Court for Eastern District of Pennsylvania.

This was a bill in equity against a corporation and its stockholders to enforce a debt due from the former against the latter. The case is stated in the opinion of the Court.

Edward F. Hoffman, and *Charles Hart*, for appellant.

R. C. McMurtrie (*Pierce Archer* with him), for appellee.

FIELD, J. The defendant, the North Carolina Gold Amalgamating Company, was incorporated under the laws of North Carolina, on the 30th of January, 1874, for the purpose, among other things, of working, milling, smelting, reducing, and assaying ores and metals, with the power to purchase such property, real and personal, as might be necessary in its business, and to mortgage or sell the same.

The plaintiff is the holder of a judgment against the company for $5489, recovered in the Court of Common Pleas of Philadelphia, on the 18th of May, 1879, upon its two drafts, one dated June 1st, 1874, and the other August 15th, 1874, each payable four months after its date. Unable to obtain satisfaction of this judgment upon execution, and finding that the company was insolvent, the plaintiff brought this suit to compel the stockholders to pay what he claims to be due and unpaid on the shares of the capital stock held by them, alleging that he had frequently applied to the officers of the company to institute a suit for that purpose, but that under various pretences they refused to take any action in the premises.

By its charter the minimum capital stock was fixed at $100,000, divided into 1000 shares of $100 each, with power to increase it from time to time, by a majority vote of the stockholders, to two million and a half of dollars. The charter provided that the subscription to the capital stock might be paid "in such instalments, in such manner, and in such property, real and personal," as a majority of the corporators might determine, and that the stockholders should not be liable for any loss, or damages, or be responsible beyond the assets of the company.

Previously to the charter, the corporators had been engaged in mining operations, conducting their business under the name and title which they took as a corporation. Upon obtaining the charter, the capital stock was paid by the property of the former association, which was estimated to be of the value of $100,000, the shares being divided among the stockholders in proportion to their respective interests in the property. Each stockholder placed his estimate upon the property;

[1] Citations of counsel and part of opinion omitted. — ED.

and the average estimate amounted to $137,500. This sum they reduced to $100,000, inasmuch as the capital stock was to be of that amount.

The plaintiff contends, and it is the principal basis of his suit, that the valuation thus put upon the property was illegally and fraudulently made at an amount far above its actual value, averring that the property consisted only of a machine for crushing ores, the right to use a patent called the Crosby process, and the charter of the proposed organization; that the articles had no market or actual value, and, therefore, that the capital stock issued thereon was not fully paid, or paid to any substantial extent, and that the holders thereof were still liable to the corporation and its creditors for the unpaid subscription.

If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the instalments has been paid. In that case there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. But where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. *Boynton* v. *Hatch*, 47 N. Y. 225; *Van Cott* v. *Van Brunt*, 82 N. Y. 535; *Carr* v. *Le Fevre*, 27 Penn. St. 413.

But the allegation of intentional and fraudulent undervaluation of the property is not sustained by the evidence. The patent and the machinery had been used by the corporators in their business, which was continued under the charter. They were immediately serviceable, and therefore had to the company a present value. The corporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item, the value of the chartered privileges, which is at all liable to any legal objection. But if that were deducted, the remaining amount would be so near to the aggregate capital that no implication could be raised against the entire good faith of the parties in the transaction.

[The learned Judge then *held* that the stockholders could not be called upon, by the plaintiff, to pay in the amount of a subsequent issue of stock, which was soon afterwards recalled and cancelled.]

Judgment affirmed.[1]

[1] [See Taylor on Corporations, 3d ed., *s.* 522 *c.* Compare 111 Iowa, 664, pp. 668-670; 19 Texas Civil Appeals, 507, p. 512. — Ed.]

WHITE, EXECUTOR, *v.* SALISBURY.

1862. 33 *Missouri*, 150.[1]

THE appellant sued the respondents upon the following instrument of writing:

"We, the undersigned, agree to pay and deliver to William White, or order, seven hundred and seventy-seven dollars and sixteen and three-fourths cents in railroad stock of the North Missouri Railroad Company, the same to be delivered to him on or before the fifteenth day of July next, which amount is understood to be seven shares and .77¾ of a share. The above shares are given in discharge of a note given by L. W. Salisbury to William White for $616.72, and dated February 21, 1853. L. W. Salisbury, H. D. Brown. Test: W. G. Shackelford. Dated 22d June, 1857."

Plaintiff averred in his petition that the defendants had failed to comply with their contract, in not delivering the railroad stock on or before the fifteenth day of July, 1857, the time agreed upon for its delivery, and claimed damages to the amount of the consideration advanced by White to Salisbury & Brown, being the note he (White) held on Salisbury for the sum of $616.72.

The answer of the defendants denied that plaintiff was entitled to damages, as claimed, or in any sum; that defendants did, in compliance with the terms of their contract, on the fifteenth day of July, 1857, have the requisite number of shares entered in the name of William White upon the books of the North Missouri Railroad Company.

This cause was submitted to the court without a jury, and the following declarations of law were prayed by plaintiff:

1. That, under the terms of the contract read in evidence between the plaintiff's testator and defendants, the defendants were bound to deliver on or before the fifteenth day of July, 1857, a certificate of the stock contracted to be delivered, and that a transfer upon the books of the company, on the fifteenth day of July, 1857, or at any previous time, without any notice to White, is not in law a sufficient delivery under said contract.

The Court refused the instructions, and gave a judgment for the defendants.

Jones & Hayden, for appellant.

I. That under the contract a transfer or entry upon the books of the company of the amount of stock contracted to be delivered was no delivery, either *actual* or *symbolical*.

[Remainder of argument omitted.]

Sharp & Broadhead, for respondents.

'I. The act of respondent Salisbury, in procuring a transfer of the amount of the stock called for by the contract on the books of the

[1] Part of case omitted. — ED.

North Missouri Railroad Company, is a substantial compliance with the contract. It may be safely stated, that upon an agreement for the sale of personal chattels, where the property is in its nature intangible and incapable of manual or actual delivery, that if the vendor, by his act, passes the title to the vendee and puts it out of his power to recall it, that it amounts to a delivery. (Acts of 1853, pp. 325 & 326, sec. 8.) This was done by act of the company, and the mere fact that the new certificates of stock were handed to defendant did not vest him with any authority or control over them; they were issued to White, and White alone could control the stock or re-assign it. (5 W. & Serg. p. 106.)

[Remainder of argument omitted.]

DRYDEN, J. The defendants, by the contract sued on, agreed to deliver to the plaintiff's testator, on or before the fifteenth of July, 1857, seven 77-100 shares of stock in the North Missouri Railroad Company. The main ground of controversy in the court below was as to what was required to be done by the defendants to comply with their engagement, the plaintiff maintaining that the delivery of certificates of stock to his testator was essential; while it was insisted by the defendants that a transfer of the stock to him on the books of the company was what was necessary, and all that was requisite. We think the defendant's theory the correct one. The end the parties intended to accomplish was to confer upon the plaintiff's testator the title and ownership of the stock contracted for. The delivery of the certificates from one party to the other would leave the title to the stock just where it was before. The only effectual mode of transferring the title was by a transfer on the books of the company, and by that means only.

The eighth section of the amended charter of the North Missouri Railroad Company, (Sess. Acts of 1853, p. 325–6,) provides that, "when payment for the stock of any subscriber or stockholder shall be fully made, the president and directors shall deliver one or more certificates of such stock, signed by the president, and countersigned by the treasurer, under the seal of the company, to such subscriber or stockholder, for the number of shares belonging to him or her, which certificates shall be transferable in a book to be kept for that purpose by the company, and, when transferred, shall be delivered up to the president and directors and be cancelled, and new certificates be issued to the assignee." In the Agricultural Bank v. Burr, 11 Shepley (Me.) R. 263, shares of bank stock had been transferred to the defendant on the books of the bank, but no certificate of stock had been issued to him. The question arose whether he was a stockholder. Mr. Justice Shepley, in delivering the opinion of the court, says, "a person becomes legally entitled to shares so transferred to him upon the books of the bank. The certificate is but additional evidence of his titles." Same Bank v. Wilson et al. 273, is to the same effect. (Ellis v. Essex Merrimack Bridge Co. 2 Pick. 243; Chester Glass Co. v. Dewey, 16 Mass. 94.)

[Remainder of opinion omitted.]

Judgment affirmed.

SIMON J. O'HERRON *v.* GRAY.
NORA L. O'HERRON *v.* SAME.

1897. 168 *Massachusetts*, 573.

Two bills in equity, filed November 21, 1894, to compel the defendants to transfer and deliver to the plaintiffs certain certificates of the capital stock of the Boston and Albany Railroad Company.

The cases were heard in this court on an agreed statement of facts, the material portions of which appear in the opinion, and a decree was entered in favor of each plaintiff, requiring the defendants to transfer and deliver to them a certificate for thirty-one and twelve shares, respectively, of the capital stock of the Boston and Albany Railroad Company, and to pay to them the amount of the dividends received by the defendants upon such stock. The defendants, in each case, appealed.

The case was argued at the bar in January, 1897, and afterwards was submitted on briefs to all the justices.

H. S. Dewey, for the defendants.

R. Foster, for the plaintiffs.

KNOWLTON, J. Each of the plaintiffs is the owner of stock in the Boston and Albany Railroad Company, represented by certificates in the possession of Gray, Dewey, and Company, the defendants. The plaintiff in the first case owned two certificates, — one for nineteen shares, and one for twelve shares, — both of which passed into the hands of the defendants, and were surrendered by them in exchange for a new certificate for thirty-one shares, issued in their own names. The plaintiff in the second case is the owner of one certificate for twelve shares, which the defendants received, and which has not been surrendered. Both of the plaintiffs are minors, and their respective certificates were made in their own names. These certificates were deposited for safekeeping by their mother, who was their guardian, in the Pittsfield National Bank. While the certificates were in the bank, the guardian borrowed money from the bank for her personal use, for which she gave her notes, and at the same time signed upon the back of each of her son's certificates a blank form of transfer, with a signature as follows: "Simon John O'Herron, by Mrs. Catherine O'Herron, Guardian." In like manner on her daughter's certificate, she signed with the signature, "Nora L. O'Herron, by Mrs. Catherine O'Herron, Guardian," and left the certificates as collateral security for the payment of her notes. This transaction occurred on or about December 17, 1889. On or about December 20, 1889, the cashier of the bank, one Francis, who had access to the vault where these certificates were kept, took them, without authority from anybody, and delivered them to the defendants, as security for one of his personal debts. In May, 1890, the guardian paid her notes at the bank.

Some time in the year 1891, the defendants took the two certificates standing in the name of Simon John O'Herron to the office of the Boston and Albany Railroad Company, and asked to transfer the stock, and have a new certificate issued in their own names. The corporation refused to permit a transfer of the stock or the issue of new certificates without a decree of the Probate Court authorizing the sale of the stock. Thereupon the defendants requested Francis to procure such a decree. He then had a petition prepared by the registrar of the Probate Court for the county of Berkshire, in the name of the guardian, praying for leave to sell and transfer the certificates, and he signed the petition as follows: "Catherine O'Herron, Guardian, by E. S. Francis." On this petition, on July 21, 1891, the Probate Court issued a decree in the usual form, authorizing the guardian to sell or transfer the whole or any part of the stock. All this was done without notice of the petition by publication or otherwise, either to the plaintiffs or to their guardian, and without the knowledge of either of them. The transfer of the stock was then made on the books of the Boston and Albany Railroad Company, and a new certificate for thirty-one shares issued to the defendants. Francis continued to act as cashier of the bank until his death by suicide, on or about July 27, 1893, when his fraudulent conduct was discovered, and his estate was found to be insolvent. He paid the dividends on the stock to the plaintiffs' guardian regularly as long as he lived. At the time of receiving the certificates the defendants supposed that Francis was rightfully in possession of them, and they had no notice of his want of authority to pledge them, except the form of the certificates and of the transfers. The question is whether the defendants acquired a good title to the stock as against the plaintiffs. It is not necessary to consider the original claim of the bank to the stock as security for the loans to the guardian, as the loans were paid. It is clear that the guardian had no right to pledge the stock, and we do not intimate that the bank acquired a valid title to it.

Francis, under whom the defendants derived their title, had no right to the certificates, but held them feloniously. They were the general property of the plaintiffs, and the special property of the bank, which had the possession of them as bailee. The act of Francis in taking them, and pledging them as his own, if not larceny at common law, was at least embezzlement, which by our statute is deemed to be larceny. Pub. Sts. c. 203, §§ 37, 41. A *bona fide* purchaser for value from one who has taken property in such a way, acquires no title to it. The only exception to this rule is when the property consists of negotiable securities. *Heckle* v. *Lurvey*, 101 Mass. 344, 345. *Spooner* v. *Holmes*, 102 Mass. 503, 507. But certificates of stock, even when indorsed in blank for the purpose of authorizing the making of an instrument of transfer over the signature, are not negotiable securities. This is settled by the highest authority. *Shaw* v. *Spencer*, 100 Mass. 382, 388. *Shaw* v. *Railroad Co.*, 101 U. S. 557, 565,

566. *Knox* v. *Eden Musée American Co.*, 148 N. Y. 441. *Bangor Electric Light & Power Co.* v. *Robinson*, 52 Fed. Rep. 520. *London & County Banking Co.* v. *London & River Plate Bank*, 20 Q. B. D. 232. It is plain, therefore, that the defendants cannot maintain their claim on the ground that the nature of the property takes it out of the general rule that no title can be acquired from one who has no title.

It is contended that St. 1884, c. 229, is applicable to these cases. If we assume in favor of the defendants that this statute will protect a *bona fide* purchaser or pledgee for value, to whom a certificate of stock has been delivered with a written transfer of it, or a written power of attorney to sell, assign, or transfer it, signed by the owner, it does not help the defendants. The signature on the back of these certificates was not that of the owner, but of a guardian whose trust relation to the property was disclosed on the face of the papers. In their report on the revision of the statutes (1834), the commissioners say, in a note to chapter 79, § 22 (which is section 21 in the final enactment), that they have made the provision as to sales of property by guardians the same as that for trustees appointed under wills. The provision for trustees under wills is found in Rev. Sts. c. 69, § 11, in Gen. Sts. c. 100, § 14, and with certain broader provisions from more recent legislation in Pub. Sts. c. 141, § 20. The provision in regard to guardians is found in Gen. Sts. c. 109, § 22. As a part of the history of the legislation, see also St. 1817, c. 190, § 35, and St. 1820, c. 54, § 3. It is the duty of one purchasing property held by a trustee to ascertain whether the transaction appears to be within the trustee's authority. *Atkinson* v. *Atkinson*, 8 Allen, 15. *Shaw* v. *Spencer*, 100 Mass. 382. *Loring* v. *Salisbury Mills*, 125 Mass. 138. *Smith* v. *Burgess*, 133 Mass. 511. *Loring* v. *Brodie*, 134 Mass. 453. *Colonial Bank* v. *Cady*, 15 App. Cas. 267. *Duncan* v. *Jaudon*, 15 Wall. 165. The statute does not protect the purchaser in a case like the present.

It is contended, further, that the plaintiffs are estopped from reclaiming their property by the negligence of their guardian in leaving their certificates at the bank, indorsed with her signature. The principle which the defendants invoke is not applicable to the facts. Negligence which will work an estoppel of this kind must be a proximate cause of the purchase or advancement of money by the holder of the property, and must enter into the transaction itself. *Swan* v. *North British Australasian Co.*, 7 H. & N. 603; *S. C.* 2 H. & C. 175. *Colonial Bank* v. *Cady*, 15 App. Cas. 267, 282. *Baxendale* v. *Bennett*, 3 Q. B. D. 525, 530. *Picker* v. *London & County Banking Co.*, 18 Q. B. D. 515. *Knox* v. *Eden Musée American Co.*, 148 N. Y. 441. *Arnold* v. *Cheque Bank*, 1 C. P. D. 578, 587, 588. *Scholfield* v. *Londesborough*, [1895] 1 Q. B. 536; *S. C.* [1896] App. Cas. 514. *Telegraph Co.* v. *Davenport*, 97 U. S. 369. *Bangor Electric Light & Power Co.* v. *Robinson*, 52 Fed. Rep. 520. If the negligence is such as might be an appropriate foundation for an action at law to recover damages by one who advances his money, it may be availed of by way of estop-

pel, to avoid circuity of action. But the facts of this case fall short of showing such negligence. The guardian intrusted the certificates to a national bank of good reputation. Neither she nor anybody else had any reason to anticipate larceny or embezzlement of the property, and a fraudulent use of it, to deceive others, by a trusted officer of the bank. She had no reason to expect that, if the certificates were stolen, anybody would take them without inquiring whether, as trust property, they had been disposed of by the guardian for the benefit of her wards. The conduct of the guardian was not a cause, but a mere condition, of the defendants' advance of money upon the faith of the certificates. A criminal act of Francis intervened as the cause of the defendants' loss, and this the guardian had no reason to anticipate.

When the certificates of stock came into the hands of the defendants, they showed on their face that they had not been assigned or transferred by their owners, but only by one who stood in a relation of trust to the owners. The transfer had not been completed, and the stock still stood in the names of the plaintiffs on the books of the corporation. There was only a signature of the guardian upon each certificate, appended to a blank which contained nothing to show the nature of the transaction by which it came into the hands of Francis. There was nothing to indicate that the plaintiffs had received value for the stock. Francis, who presented the certificates, was using them solely for his personal benefit. On the face of the paper there was notice to the defendants that they were trust property while in the hands of the guardian. The defendants were put upon inquiry, and they had no right to receive them as a pledge for Francis's debt, without at least having information of facts which would warrant them in believing that the plaintiffs' interests had been protected in the transaction by which they came into the hands of Francis. Apparently they made no inquiry, but took them as they were, knowing that the plaintiffs were to receive nothing from the disposition which Francis then made of them. We are of opinion that there is no principle of estoppel that can be invoked in favor of the defendants to deprive the plaintiffs of their property.

The decree of the Probate Court does not give effect to the claim of the defendants. It was not made until long after the transfer to them. It purported to authorize a sale of the stock, and not a pledge of it, much less a pledge of it for the benefit of others than the plaintiffs. But, above all, the Probate Court acquired no jurisdiction of the case as against the plaintiffs. No case nor any proper party was ever before the court in regard to the sale of the stock. The unauthorized signature and appearance of Francis availed nothing as against the plaintiffs or their guardian. *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87. *Scott* v. *McNeal*, 154 U. S. 34, 46.

. . . . . .

Decree in each case affirmed.[1]

[1] A stockholder agreed to sell his shares, and deposited with the corporation his cer-

In re BAHIA AND SAN FRANCISCO R. CO.

1868. *Law Reports*, 3 *Queen's Bench*, 584.

On the 11th of May, 1867, it was ordered by rule of court, under 25 & 26 Vict. c. 89, s. 35,[1] that the name of Amelia Trittin be re-

tificates with a blank indorsement signed by him. New certificates were issued in their stead to the purchaser. It was the duty of the manager of the corporation to cancel the old certificates. Instead of doing so, he delivered them to Knox as security for a loan. *Held*, that the corporation was not estopped to deny the validity of the old certificates, and that Knox could not recover of the corporation the damages sustained by him by reason of his loaning money on the faith of the certificates. *Knox* v. *Eden Musée &c. Co.*, A. D. 1896, 148 N. Y. 441. — Ed.

[1] The 25 & 26 Vict. c. 89 applies (s. 176) with certain exceptions to companies formed and registered under the Joint Stock Companies Acts of 1856 and 1857.

Section 25: — Every company under this act shall cause to be kept in one or more books a register of its members; and there shall be entered therein the following particulars: (1) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number; and of the amount paid or agreed to be considered as paid on the shares of each member. (2) The date at which the name of any person was entered in the register as a member. (3) The date at which any person ceased to be a member. And any company acting in contravention of this section, shall incur a penalty not exceeding 5*l.* for every day during which its default in not complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorize or permit such contravention, shall incur the like penalty."

Section 31: — "A certificate, under the common seal of the company, specifying any share or shares, or stock held by any member of a company, shall be primâ facie evidence of the title of the member to the share or shares or stock therein specified.

By s. 32, the register is to be open to the inspection of a member gratis, and of a stranger on payment of 1*s.*

Section 35: — "If the name of any person is without sufficient cause entered in or omitted from the register of members of any company under this act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may as respects companies registered in England or Ireland, by motion in any of her Majesty's superior courts of law or equity, or by application to a judge sitting in chambers, or to the vice-warden of the stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the court of session, or in such other manner as the said courts may direct, apply for an order of the court that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party

stored to the register of the Bahia and San Francisco Railway Company in respect of the five shares in the company numbered 84,511 to 84,515 both inclusive, and that the company do pay to Amelia Trittin any dividends that have fallen due since the shares were transferred from her name. And it was further ordered that a special case be stated for the opinion of this Court between the Reverend Richard Burton and Mary Anne Goodburn and the company, for the purpose of determining the amount of damages (if any) which the company are liable to pay them respectively.

1. On the 8th of March, 1866, Miss Amelia Trittin was the registered holder of five shares in the Bahia and San Francisco Railway Company, Limited, hereafter called "the company," and deposited the certificates of the shares with one Thomas Charles Oldham, a stock-broker, and requested him to keep the same and to receive the dividends payable thereon.

2. On or about the 17th of April, 1866, a transfer of the five shares to John Alfred Stocken and Samuel Goldner, purporting to be executed by Amelia Trittin, but which for the purpose of this case is admitted to have been a forgery, was left with the secretary of the company for registration, together with the certificates of the shares.

3. The secretary of the company, in the ordinary course of business, then sent by post to the last place of residence of Miss Trittin a written notice that the deed of transfer had been so received by him, and after ten days having received no answer from her, registered the deed of transfer and removed the name of Miss Trittin from and placed the names of John Alfred Stocken and Samuel Goldner upon the register of shareholders as holders of the aforesaid five shares, and share certificates in respect of the said shares were handed to them.

4. In May, 1866, the Reverend Richard Burton through his broker bought on the Stock Exchange four shares in the company, and Mrs. Mary Anne Goodburn by her broker bought one share.

5. About the same time, John Alfred Stocken and Samuel Goldner sold five shares in the company to Arthur Bristowe, a stockbroker, and in pursuance of the above contracts transferred four of the shares comprised in the forged transfer to Mr. Burton, and the remaining one to Mrs. Goodburn.

aggrieved may have sustained. The court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the court, if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal in the manner directed by 'the Common Law Procedure Act, 1854,' shall lie."

Section 37: — "The register of members shall be primâ facie evidence of any matters by this act directed or authorized to be inserted therein."

6. It is admitted that Mr. Burton and Mrs. Goodburn entered into the contracts above-mentioned bonâ fide and for value of the shares, without notice of any fraud, and according to the usual course of business with reference to the purchase of shares, and on or shortly after the 28th of May, 1866, they were duly registered by the company as the holders of the shares, and share certificates in respect thereof were handed to them.

6a. In the above transactions everything was done by the company in accordance with the usual custom of business, and there was nothing in the circumstances so far as they were known to the company to excite their suspicion or to induce them to depart from such usual course of business.

7. The form of certificate used by the company was:—

Certificate of Shares.

Bahia and San Francisco Railway Company, Limited.

Registered under the Joint Stock Companies Act of 1856.

28th January, 1858.

Nos. to . Five shares of 20*l.* each.

This is to certify that is the registered holder of the shares Nos. to in the above company, subject to the articles of association, on each of which there has been paid to this day three pounds.

Given under the common seal of the company,

Signed by two directors. the day of 18

8. The articles of association were made part of the case. By art. 1, the regulations of table B. of the Joint Stock Companies Act, 1856, were excluded, except as expressly set forth in the articles themselves, By art. 25, the board shall determine the mode and conditions of, and the charges for the transfer of shares, but no such charge shall exceed 2*s.* 6*d.* for every transferor named in the instrument of transfer. By art. 26, every original shareholder shall, on payment of such sum, not exceeding 2*s.* 6*d.*, as the directors prescribe, be entitled to a certificate under the common seal of the company, and under the hands of two of the directors, specifying the shares held by him, and the amount paid up in respect thereof.

The questions for the opinion of the Court were: 1. Whether, as against the company, Mr. Burton and Mrs. Goodburn are entitled to the said shares in the company, or an equivalent number. 2. Whether they are entitled to any and what damages to be paid to them by the company under the above circumstances.

The Court were to make such order and give such judgment as they might think fit, and have power to make and give.

J. Brown, *Q. C.* (*W. G. Harrison* with him), for the claimants, Burton and Goodburn.

[Argument omitted.]

Watkin Williams (*Cohen* with him), for the company. The contract which a buyer makes in the market is only for a certain number of shares, not any specific shares, and it is not till the purchase is complete that the company is called upon to act and register the transfer. There is, therefore, no contract on which the company can be held liable to the claimants. Nor is there any breach of duty shown on the part of the company; the secretary acted with due caution by notifying the proposed transfer to Miss Trittin, the person purporting to transfer, and the case states (par. 6a) that everything was done by the company in the usual course of business.

[BLACKBURN, J. — The company are bound by the statute to keep a correct register.]

Only to use due diligence in keeping it correct, not to have a register absolutely correct: see East Gloucestershire Railway Company *v.* Bartholomew, Law Rep. 3 Ex. 15.

[BLACKBURN, J. — That case does not touch the present case.

COCKBURN, C. J. — As far as the register is concerned, it does not appear that the claimants ever referred to the register.]

Then it is said that the company, having issued share certificates to Stocken and Goldner, as their credentials of membership, are estopped from denying their title. But the company never asserted they had title, but only that they were on the register as shareholders, which is true. The certificate is no representation to third persons, it is only a document between the holder and the company.

[BLACKBURN, J. — The statute (s. 31) makes the certificate expressly primâ facie evidence of the title of the holder.]

As between him and the company.

[BLACKBURN, J. — No, primâ facie evidence generally.]

In all the cases bearing on the subject, the company sought to be made liable had been guilty of negligence; as in Ashby *v.* Blackwell, 2 Eden 299, where the power of attorney was grossly irregular on the face of it. Hidyard *v.* South Sea Company and Keate, 2 P. Wms. 76, is the only case really in point. There, on a transfer of stock under a forged letter of attorney, the dividends and stock were ordered to be refunded and restored by the *assignee* to the right owner, and the company were held not responsible.

[BLACKBURN, J. — That was a case between the company, the purchaser under a forged letter of attorney, and the true owner; the rights of sub-purchasers had not to be considered.]

But surely the remedy is against the vendor, if the purchaser gets nothing, instead of what he contracted for. The company were not in fault; the claimants were not misled by the company, they made no inquiries, nor ever saw the register, as the Lord Chief Justice has pointed out.

[COCKBURN, C. J. — No; but by giving the certificate the company practically armed the vendors with the means of holding themselves out as the holders of these shares.

LUSH, J. — The question comes round to this, what does the certificate mean: does it certify only that A. B. is on the register, or does it not rather amount to certifying that he is in reality a shareholder?]

Only that he is on the register.

[BLACKBURN, J. — Can that be said in the face of s. 31?

LUSH, J. — Suppose after the contract, but before he pays the purchase-money, the purchaser applies to the company to know if his vendor is a member of the company, and the answer is yes? The company would then have made a representation on which they intended the purchaser to act. How does that differ from issuing a certificate, which says the same thing?]

It differs in this: the company do not make a voluntary statement, they are bound to keep a register, and issue a certificate.

[BLACKBURN, J. — They are not bound to put a person on the register who is not rightfully entitled.]

But in order to make them liable for putting a person not entitled on the register negligence must be shown, which is, in effect, negatived in this case. In Swan *v.* North British Australasian Company, 2 H. & C. 175, 181, 188, 32 L. J. Ex. 276, 279, Cockburn, C. J., says, "To bring a case within the principle estabished by the decisions in Pickard *v.* Sears, 6 Ad. & E. 469 (E. C. L. R. vol. 33), and Freeman *v.* Cooke, 2 Ex. 654, 18 L. J. Ex. 114, it is, in my opinion, essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered." And in the same case, Blackburn, J., says, "I agree that a party may be precluded from denying against another the existence of a particular state of things, but then, I think, it must be by conduct on the part of that party such as to come within the limit so carefully laid down by Parke, B., in delivering the judgment of the Court of Exchequer in Freeman *v.* Cooke, 2 Ex. 663, 659, 18 L. J. Ex. 119, 117. It is pointed out by Parke, B., in the course of the argument in that case, that in the majority of cases in which an estoppel exists, 'the party must have induced the other so to alter his position that the former would be responsible to him in an action for it.' And he had before pointed out that 'negligence,' to have the effect of estopping the party, must be 'neglect of some duty cast upon the person who is guilty of it.' And this, I apprehend, is a true and sound principle."

COCKBURN, C. J. — I am of opinion that our judgment must be for the claimants. If the facts are rightly understood, the case falls within the principle of Pickard *v.* Sears and Freeman *v.* Cooke. The company are bound to keep a register of shareholders, and have power to issue certificates certifying that each individual shareholder named therein is a registered shareholder of the particular shares specified. This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market,

and to afford facilities to them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is, therefore, for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares. It is stated in this case that the claimants acted bonâ fide, and did all that is required of purchasers of shares; they paid the value of the shares in money on having a transfer of the shares executed to them, and on the production of the certificates which were handed to them. It turned out that the transferors had in fact no shares, and that the company ought not to have registered them as shareholders or given them certificates, the transfer to them being a forgery. That brings the case within the principle of the decision in Pickard *v.* Sears, 6 Ad. & E. 469 (E. C. L. R. vol. 33), as explained by the case of Freeman *v.* Cooke, 2 Ex. 654, 18 L. J. Ex. 114, that, if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact.

The only remaining question is, what is the redress to which the claimants are entitled. In whatever form of action they might shape their claim, and there can be no doubt that an action is maintainable, the measure of damages would be the same. They are entitled to be placed in the same position as if the shares, which they purchased owing to the company's representation, had in fact been good shares, and had been transferred to them, and the company had refused to put them on the register, and the measure of damages would be the market price of the shares at that time; if no market price at that time, then a jury would have to say what was a reasonable compensation for the loss of the shares.

BLACKBURN, J.—I am of the same opinion. When joint stock companies were established, the great object was that the shares should be capable of being easily transferred; and the legislature has made provision by 25 & 26 Vict. c. 89, s. 25, that the company shall keep a register of the members, and when the capital is divided into shares, each share is to be distinguished by a number, and the shares held by each member is to be specified, and the dates at which each person's name was entered on the register. In order to keep up such a register, the company must alter its register whenever a transfer of shares is made, on the application and payment of a certain sum to them by the person to whom the shares are alleged to be transferred. And the first thing the company would have to do when a transfer was tendered to them, would be to inquire into its validity; but a company may be deceived, and induced, as the company were in the present case, without any negligence, to receive as genuine a forged transfer. They accordingly

FORD *v.* EASTHAMPTON RUBBER THREAD CO.

1893. 158 *Mass.* 84.

CONTRACT for money had and received. At the trial in the Superior Court, without a jury, before *Aldrich*, J., there was evidence tending to show that the plaintiff on June 16, 1891, owned fifty-two shares of the capital stock of the defendant company, of the par value of one hundred dollars per share; that on that day the directors passed the following vote, namely, "That a dividend of 20 per cent be paid to stockholders of this date, payable Tuesday, June 23d, 1891"; that on said June 16th the annual meeting of stockholders of the company for the election of directors was held immediately after the meeting of directors, according to custom, and duly elected five directors, as provided by the by-laws of the company, two only of the old directors being re-elected, and no director being re-elected who voted for the twenty per cent dividend, though the two who were re-elected were present at the meeting when it was voted; and that on said June 16th, as soon as the stockholders' meeting adjourned, the directors elected and re-elected thereat met, qualified, organized for the year, and passed the following votes: "That the vote passed by the directors of this company this day declaring a dividend of 20 per cent on the capital stock of the company, payable Tuesday, June 23d, 1891, be reconsidered and rescinded; the same is hereby rescinded. That a dividend of six per cent, payable June 23d instant to stockholders of record this day, be declared in place of the dividend voted at earlier meeting of this board this day." It also appeared that no money was set aside or provided to pay said dividend of twenty per cent, but the company had ample means and facilities for paying the twenty per cent dividend; that always before money had been provided to pay a dividend before it was declared; that money to pay said six per cent dividend was provided after the meeting and before said 23d of June by borrowing, and the same was set aside and deposited in bank therefor; that the treasurer sent the check of the defendant on the bank where the money was deposited to each stockholder of record of said June 16th to pay the dividend on his stock at six per cent, including the plaintiff, on said 23d June, 1891; and that the plaintiff declined to accept the check, and returned the money to the treasurer. It further appeared in evidence that no stockholder of the defendant had been paid the twenty per cent dividend for June, 1891; that a majority of the stockholders had accepted the dividend of six per cent paid by checks as aforesaid on June 23, 1891, in full; that the plaintiff, by his attorney, by letter of June 30, 1891, demanded payment of the twenty per cent dividend from the defendant; and that the plaintiff made no objection to the check of the defendant sent him to pay the dividend of June 16,

1891, except that it was for a dividend of six per cent, instead of twenty per cent.

The defendant asked the court to rule that the directors elected on June 16 had a right on that day to rescind the vote whereby the twenty per cent dividend was declared payable at a future day; and that the plaintiff could not recover. The judge declined so to rule, ordered judgment for the plaintiff, and reported the case for the determination of this court. If the refusal to rule and order of judgment were correct, judgment was to be affirmed; otherwise, judgment was to be ordered for the defendant.

G. M. Stearns, for the plaintiff.

W. G. Bassett, for the defendant.

FIELD, C. J. It seems to be settled that, when a dividend has been fully declared, the corporation thereby manifests its intention that the amount of the dividend should be considered as having been separated from the other property of the corporation, and as having become the individual property of the stockholders, and that therefore, when the dividend becomes payable according to the terms of the vote declaring it, each stockholder has a right to demand payment of the proportional part of the dividend which belongs to his shares of stock, and to sue the corporation for it, if it is not paid on demand. In some cases money or other property equal to the whole amount of the dividend declared has been specifically set apart as a fund appropriated to the payment of the dividend, and the stockholders have been regarded as the *cestuis que trust* of this fund, each entitled to his share. In other cases, the corporation has credited the stockholders with the amount of their shares of the dividend, and the stockholders have assented to this, and the amount so credited has been regarded as a debt of the corporation to the stockholders; or the corporation has paid to some of the stockholders their shares of the dividend, and has refused to pay anything to the others, and it has been held that the corporation must pay all alike. See *Beers* v. *Bridgeport Spring Co.* 42 Conn. 17; *State* v. *Baltimore & Ohio Railroad*, 6 Gill, 363; *King* v. *Paterson & Hudson River Railroad*, 5 Dutch. 504; *Jermain* v. *Lake Shore & Michigan Southern Railway*, 91 N. Y. 483; *Hopper* v. *Sage*, 112 N. Y. 530; *Jackson* v. *Newark Plankroad Co.* 2 Vroom, 277; *Wheeler* v. *Northwestern Sleigh Co.* 39 Fed. Rep. 347. When a dividend has been declared payable at a definite future time, but no fund has been set apart for the payment of the dividend, and the corporation meanwhile becomes insolvent, whether the stockholders to the extent of their proportions of the dividend should share ratably with the creditors of the corporation in its property has not, so far as we know, been recently considered, but the decision in *Lowene* v. *American Ins. Co.* 6 Paige, 482, is that they should. The setting apart of a fund to pay a dividend has been held to give a lien upon it to the stockholders, which they can enforce to the exclusion of the general creditors of the corporation. *In re Le Blanc*, 14 Hun, 8, and 75 N. Y. 598. *Le Roy*

v. *Globe Ins. Co.* 2 Edw. Ch. 657. The English Companies' Act, 1862, (25 & 26 Vict. c. 89, § 38, cl. 7,) provides that "no sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves." Upon these questions, however, we desire to express no opinion.

It has been argued that there is no consideration for the promise of a corporation to pay a dividend to its stockholders, but we think that the doctrine of consideration applicable to a simple contract between persons having no fiduciary relations to each other is not applicable to such promise. It is the object of a private business corporation to make money for its stockholders, and, under our laws, it is ordinarily the duty of the directors from time to time to declare dividends out of the net earnings, if there are any, and it must be left largely to the discretion of the directors to determine when and for how much such dividends should be declared. The whole property of the corporation is held on a sort of trust for the stockholders, and the directors are, in a general sense, the managers; and when a dividend is declared by the directors, the declaration is a determination by a body authorized to make it that the amount of the dividend should be taken from the property of the corporation and paid over to the stockholders. The cause of action of each stockholder against the corporation for non-payment of the dividend does not arise from any actual contract between the corporation and its stockholders, but from the nature of the organization, and the relation of the stockholders to the corporation and its property. Unless the rights of creditors intervene, or the corporation is enjoined from paying the dividend, on the ground that the dividend has not been earned, or on some other ground, the amount of the dividend, after it has been declared and has become payable, is considered as property held by the corporation for the use of the stockholders individually, and the stockholders may recover their shares as money or property had and received to their use. We have been able to find little or no authority on the precise question involved in this case, namely, whether, after a dividend has been duly declared by a vote of the directors, but payable at a future time, the vote can be rescinded at a subsequent meeting of the directors, held before the time at which the dividend becomes payable according to the vote, when the fact that a dividend has been declared has not been made public, or in any manner communicated to the stockholders, and when no fund has been set apart for the payment of the dividend. On principle, we do not see why the directors may not rescind such a vote, under the circumstances stated. By the vote no specific property passed to the stockholders. If the vote be regarded as a declaration of trust in favor of

the stockholders, it could be revoked before it was communicated to them or any property was identified and set aside for them. Indeed, cases may easily be supposed of such a change in the affairs of a corporation, between the time when a dividend is declared and the time when it becomes payable, as to make the exercise of such a power by the directors useful, if not necessary, for the successful continuance of the business of the corporation. It appears in the present case that the meeting of the new directors at which the vote was rescinded was held after the annual meeting of the stockholders, but on the same day as the meeting of the directors at which the vote was passed, which was held just before the meeting of the stockholders; and that at the meeting of the stockholders "the president did not, as had for many years been the custom, announce that any dividend had been declared, or promulgate the same to the stockholders"; and it does not appear that any of the stockholders, except the directors, knew of the original vote, or that any of the stockholders had made any contracts, incurred any liability, or done anything relying on the vote. It also appears that no fund was distinctly set apart for the payment of the dividend before the vote was rescinded. As the passage of the vote did not constitute an actual contract of the corporation with its stockholders, but was merely a mode of dividing the earnings of the property of the corporation among the stockholders, we are of opinion that before the division had been actually made, and before the position of the stockholders had been changed in reliance on the vote, — certainly before the passage of the vote had been made public, or communicated to the stockholders, — it was within the power of the directors, at a meeting subsequent to that at which the vote was passed, to rescind it. In this action at law, we cannot supervise the exercise of this power by the directors. *Judgment for the defendant.*

McNAB *v.* McNAB & HARLIN MANUF. CO., ET ALS.

1891. 69 *New York Supreme Court* (62 *Hun.*), 18.[1]

NEW YORK Supreme Court, General Term, First Department. Appeal from Special Term, New York County.

Action brought to compel the division of a surplus among the shareholders. A judgment was rendered, dismissing plaintiff's complaint. Plaintiff appealed.

Artemus V. Smith, for appellant.

Frederic R. Coudert and *Frederic G. Dow*, for respondents.

DANIELS, J. The McNab & Harlin Company, defendant, was incorporated on or about the 28th of April, 1871, under the laws of this

[1] Only so much of the case is given as relates to one point. — ED.

state providing for the incorporation of manufacturing companies. Its business was declared to be that of manufacturing brass and iron goods for sale, and since its incorporation it has carried on that business. The plaintiff was the owner of 8 shares of its capital stock, which consisted of 150 shares, of $1,000 each, and the other defendants were officers and shareholders in the company. After its formation, and in or about the year 1877, the company became unable to pay its debts, and a proceeding in bankruptcy was instituted to discharge it from its debts. Soon after the proceeding was commenced the defendant Harlin became the president of the company. He owned seventy-eight shares of its capital stock, and compromised the debts owing to the creditors of the company. The agreement for the compromise was to pay seventy-five per cent. within the period of three years. After he took charge of the affairs of the company as its president, and under his management, the business became prosperous, and the seventy-five per cent. was paid to the creditors, and afterwards they were paid the additional sum of twenty-five per cent., making payment of their demands in full. The prosperity of the company continued, owing to the judicious management of the president, and for eight years prior to the time of the trial, which took place in May, 1891, its net profits amounted to the sum of $100,000 a year, or a sum slightly in advance of that amount, and from the year 1881 to the year 1891 it made and paid a dividend on its shares amounting to an average exceeding the sum of twenty-five per cent.; and, in addition to the dividends made in this manner, it accumulated a large surplus, which was mainly used in its business, but to the extent of about one hundred thousand dollars was in its deposit accounts. And it was stated by the treasurer in his evidence upon the trial that there was at that time an actual surplus owned by the company amounting to the sum of $152,209, and the plaintiff, whose action was brought to secure the distribution of the surplus by way of dividends, alleged and claimed that a still larger surplus had been earned and was owned by the company; and it was one of the principal objects of the action to secure the division of this surplus by way of dividends among the shareholders. But it was proved in the course of the trial that the surplus maintained by the company was profitably employed in purchasing the material used by it in the course of its manufactures, and that it was considered for the best interests of the company not to divide this surplus among the shareholders. The directors, in restricting the dividends as they did, seem to have been impressed with the propriety of this conviction, and the dividends were accordingly limited to such amounts from year to year as did not intrench upon the large surplus which had been earned and secured. In their action upon this subject the trustees appear to have exercised the judgment which they deemed to be most consistent with the prosperity and maintenance of the interests of the company, and the statute under which the incorporation took place delegated the authority of the trustees to manage the stock, property, and concerns

of the company (2 Rev. St., 5th Ed., p. 503, § 29;) and to what amount the dividends shall be made, and the extent of the surplus which the interests of the company may require to be retained, are within this delegation of authority confided to the trustees. And it was so regarded in *Williams* v. *Telegraph Co.*, 93 N. Y. 162, where it was said, with the apparent approval of the court, that "when a corporation has a surplus, whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts." Id. 192. And no broader principle than this was either stated or sanctioned in *Scott* v. *Fire Co.*, 7 Paige, 198, or in either of the other authorities which have been brought to the attention of the court. The principle to be applied is that which shall secure the observance of good faith on the part of the directors, and this principle was neither denied nor intrenched upon in *Seeley* v. *Bank*, 8 Daly, 400, which was affirmed in 78 N. Y. 608. The trustees are chosen by the shareholders, to exercise their best judgment, depending upon their knowledge of the affairs and condition of the company; and when that has been done, the courts do not undertake to control their action, although they might differ in their views of the proper management to be adopted and followed. No reason has been disclosed by the case for doubting or impeaching the good faith of these trustees. Neither can it be affirmed justly, in view of the large business carried on by the company, that they acted unreasonably or capriciously in declining to order a larger dividend than that which was in fact paid to the shareholders.

[Opinion on other points omitted.]

Judgment affirmed.

STRINGER'S CASE. In re MERCANTILE TRADING CO.

1869. *L. R.* 4 *Chan. Ap.* 475.

This was an appeal from an order of Vice-Chancellor *Malins*, made in the winding up of the *Mercantile Trading Company, Limited.*

The company was registered under the *Companies Act*, 1862, on the 27th of June, 1863. The objects of the company, as stated in the memorandum of association, were the purchase of goods and ships for export and transmission to *America*, for sale or barter and return and sale of goods from thence, and the chartering or freighting of ships, and all other matters necessary for carrying on the operations of the company, or other operations of a similar character. It was, however, admitted that the real object of the company was to trade with the *Confederate States of America*, by running the blockade then maintained by the government of the *Federal States*. For this purpose

they provided a line of ships running from *Bermuda* to *Charleston* and *Wilmington*, which were intended to carry goods from *England* to the *Confederate* government, and to bring back cargoes of cotton in return.

The company had a nominal capital of £150,000, of which about £112,000 had been paid up. The articles of association embodied the rules given in Table A of the *Companies Act*, 1862, which provide, in Rule 73, that "no dividend shall be payable except out of the profits arising from the business of the company, except so far as modified by the articles;" and the articles provided, by Article 5, that "the directors shall declare a dividend on the subscribed capital of the company as soon and as often as the profits of the company in hand are sufficient for payment of a dividend of £5 per cent. on such capital, subject to the resolutions of a general meeting of the company called with reference thereto."

Shortly after the establishment of the company, the directors entered into a contract with the *Confederate* government, under which the *Confederate* government agreed to be co-owners of the ships employed by the company, and that the ships should be owned in the proportion of two-thirds by the *Confederate* government, and one-third by the company; the ownership of the *Confederate* government to be paid for in cotton, at *Charleston* or *Wilmington*, on the basis of 6*d.* per pound for "*Middling Upland*" cotton.

Several successful trips were made by the ships, and although some of them were captured or lost, a considerable profit was at first made by the company on their adventures. In May, 1864, a balance sheet was made out of the state of the company, down to the 29th of February, 1864, showing a profit of £42,718 15*s.* 2*d.*, out of which the directors proposed a dividend to be paid at the rate of £25 per cent. on the capital, amounting to about £28,000. This dividend was adopted by a general meeting of the company, held on the 17th of May.

The balance sheet was submitted to the directors of the *Agra and United Service Bank*, the company's bankers, and was examined by their accountants. The bank then advanced them upwards of £21,000 towards the payment of the dividend to the shareholders, although their account was already overdrawn to the amount of £5000. The dividend received by Mr. *E. P. Stringer*, the managing director, in respect of his shares, amounted to £3560.

The termination of the civil war in *America*, by the success of the *Federal* government, caused the failure of the company, the cotton appropriated to them in the *Confederate States* being all destroyed or captured, and the debt due from the *Confederate* government turning out worthless. The company was accordingly wound up, the only creditor of large amount being the *Agra and Masterman's Bank*, which had succeeded to the business of the *Agra and United Service Bank*. The present application was made by the official liquidator to obtain a repayment by Mr. *Stringer* of the dividend received by him, on the ground that

the balance sheet was delusive, and the dividend really paid out of the capital of the company. The sections of the *Companies Act*, 1862, under which it was contended that the Court had jurisdiction to order the return of the money upon this application, were the 101st and 165th.

The principal objections made to the balance sheet were as follows: First, that the directors had taken credit for a sum of £51,589 due to the company from the *Confederate* government as an asset of the company at its full value; secondly, that they had also taken credit for cotton within the *Confederate States*, which was all subsequently destroyed, at the value of £17,000; and, thirdly, that they had entered the loss of three ships as a loss of only one-third of their value, thus reckoning the guarantee of the *Confederate* government for the other two-thirds at its full value.

The Vice-Chancellor was of opinion that the dividend declared was altogether delusive, and that it amounted to a return of one-third of the capital to the shareholders; but he also held that he had no jurisdiction under the 101st or 165th sections of the *Companies Act*, 1862, to make an order for the return of the dividend; but that it was necessary for the official liquidator to file a bill for that purpose. The official liquidator appealed from this decision.

Cotton, Q. C., and *Higgins*, for appellant.

The declaration of the dividend was both in violation of the articles and delusive, amounting to a return of part of the capital. Table A of the *Companies Act*, 1862, which was adopted by the company, forbids payment of dividend out of capital, and the 5th clause of the articles is still further restrictive, providing that the dividends are to be paid out of "profits in hand." So far was the company from having profits in hand that they were obliged to borrow part of the money to pay the dividend from the *Agra and Masterman's Bank*. But the balance could not be called profits in any sense until it was known whether the cotton in the *Confederate States* and the debt of the *Confederate* government could ever be realized. The directors were not justified in putting a value upon what they could not realize, and which it was very doubtful whether they would ever be able to realize. At all events, the value put upon these items was much too high. No cotton in the *Confederate States* or liability of the *Confederate* government bore such a high price in the market at that time as was put upon these items in the balance sheet.

. . . . . .

Glasse, Q. C., and *H. M. Jackson*, for *Stringer*.

There is nothing in the articles to render this dividend improper. The 5th clause does not mean that the directors were only to pay profits out of money at their bankers. They were to estimate the profits in the usual mercantile way, that is, by valuation of the assets of the company. This was done; there was no concealment on the balance sheet, and it was submitted to the *Agra and Masterman's*

Bank, who understood all the circumstances, and would not have advanced the money unless the balance sheet had been honestly made. And yet they are the very parties who are now, through the official liquidator, complaining of it. At that time the prospects of the *Confederate* cause and the security of the government were thought good by most mercantile men, and it is not right to judge of the fairness of the transaction by the result of the speculation.

. . . . . .

[The opinion of Sir C. J. Selwyn, L. J., is omitted.]

SIR G. M. GIFFARD, L. J. [After deciding that the Court has power, under the Companies Act, to order a repayment of dividends declared and paid under a delusive and fraudulent balance sheet:]

Now, with regard to this case, the first important matter that we have to consider is the effect of these articles of association, and I quite agree that if the effect of these articles was that you could have no division of dividends until all the transactions were wound up, that you could have no legal dividend except out of what is termed profits in hand, there might be a great deal to be said in this case; but if we look at the articles of association as compared with Table A., it is clearly manifest that the articles of association amount to nothing of the kind. [His Lordship then referred to the provisions in Table A., and in the articles of association, which have been before mentioned, and continued:—] I have no hesitation in saying — especially if you compare the word "may" in Table A., and the word "shall" in the 5th clause, and consider that there are negative words in Table A., and that there are none in this clause — that this clause was intended simply to have this effect, and no other, viz., that when the directors had in their hands profits they should not be able to set them aside for a contingency fund, and that they should then, at all events, be compellable to make a dividend. It did not prevent their making a dividend; but I agree, it must be out of profits, although those profits were not profits in hand.

Then, when we come to the facts themselves — I will not again go through them, for they have been considered at very considerable length, not only in argument, but also by my learned brother — it was not argued or suggested, nor could it be argued or suggested, that it was intended that this thing, though in terms a dividend, should cover what was not really a dividend transaction. The mode in which the matter was done was fair enough. The books were put into the hands of an accountant, calculations were made, and a certain conclusion was arrived at. True it is, no doubt, that these proceedings were full of risk; but although, on the one hand, there might be a great loss, everyone knows that whenever there was a success the profits were something very enormous, and upon the balance sheets as taken from the books it did appear that there was a profit of £42,000, and it was proposed out of that to divide somewhere about £28,000, the profits, I agree, not being profits in hand. The fault that is found with that is, that the

estimate was an erroneous estimate; that too sanguine a view was taken of the prospects of success; and that there ought to have been a very much less sum put upon the face of this balance sheet as assets than really was put there. But I do not think that anyone can say it was not at this date possible for honest persons carrying on this trade, entertaining the view which they did entertain as to their prospects, honestly to make out such a balance sheet as this, and honestly to believe that those were profits fairly divisible between them. As I have said before, this was not done in any underhand manner; the whole thing was patent and open; it was known, or capable of being known, by every shareholder, and if the directors of the *Agra and Masterman's Bank* did not know anything about it, they neglected their duty, and behaved most shamefully to their own shareholders whose money they lent; for the balance sheet was put in their hands, and they had accounts of every description, and they must have known perfectly well that it was neither more or less than a blockade-running company; the very nature of the accounts shewed it; and so far from there being any concealment, the balance sheet itself was put into the hands of the auditors, and no person who knew what the business of the company was could look through that balance sheet without seeing at once that the full value was put upon the *Confederate* government debt, and that the four ships had been lost, and without knowing at once that if things turned out adversely that which was profit might, from subsequent events, become a great loss. Again, this dividend was declared in May, 1864, and was actually paid in June, 1864, and I cannot forget that it was actually paid by the *Agra and Masterman's Bank*, who not only advanced the money, knowing the affairs of the company, but who paid the dividends through the medium of cheques drawn upon them by the shareholders. I think it would be a gross injustice if at this distance of time, when a dividend has been made and paid in this way so long ago as the year 1864, because things turn out adversely afterwards, and the company is wound up in 1867 at the instance of a creditor, such a dividend should be repaid. I quite agree when there has been what can be termed fairly a misappropriation of assets as against a creditor, that creditor has a right in the winding-up to have those assets recouped; but I cannot think that such a dividend as this was in any sense a misappropriation as against either the *Agra and Masterman's Bank* or any other creditors, or that it was in any sense delusive, or in any sense a fraudulent transaction, or that it was any other transaction than this, viz., that mercantile men who were engaged in adventures which might result in very great or even total loss, and which might also result in very great profit, took a sanguine view of what the value of the assets was, looking at what at that date was the actual profit made, and acted upon that *bonâ fide*, not intending to defraud in any way any person whatever.

Therefore, I am of opinion that this appeal must be dismissed with costs.

McDONALD, Receiver, v. WILLIAMS.

1899. 174 *United States*, 397.[1]

Suit by receiver of the Capital National Bank of Lincoln, Nebraska, to recover from defendants, stockholders in the bank, the amount of certain dividends previously received by them.

Upon a trial in the U. S. Circuit Court there was a decree in favor of plaintiff for the recovery of a part of the sums claimed. Both parties appealed. Upon the argument of the appeal in the Circuit Court of Appeals, that court desired the instruction of the Supreme Court on certain questions.

It appears from the statement of facts made by the court that the bank suspended payment in January, 1893, in a condition of hopeless insolvency, the stockholders, including the defendants, have been assessed to the full amount of their respective holdings, but the money thus obtained, added to the amount realized from the assets, will not be sufficient even if all dividends paid during the bank's existence were repaid to the receiver, to pay seventy-five per cent. of the claims of the bank's creditors.

This suit was brought to compel the repayment of certain dividends paid by the bank to the defendants on that part of the capital of the bank represented by their stock of the par value of $5000, on the ground alleged in the bill that each of said dividends was fraudulently declared and paid out of the capital of the bank, and not out of net profits.

A list of the dividends and the amount thereof paid by the bank from January, 1885, to July, 1892, both inclusive, is contained in the statement, and it is added that all dividends, except the last, (July 12, 1892,) were paid to the defendant Williams, a stockholder to the amount of $5000, from the organization of the bank. The last dividend was paid to the defendant Dodd, who bought Williams' stock, and had the same transferred to his own name December 16, 1891.

When the dividend of January 6, 1889, was declared and paid, and when each subsequent dividend, down to and including July, 1891, was declared and paid, there were no net profits. The capital of the bank was impaired, and the dividends were paid out of the capital, but the bank was still solvent. When the dividends of January and July, 1892, were declared and paid there were no net profits, the capital of the bank was lost, and the bank actually insolvent.

The defendants, neither of whom was an officer or director, were ignorant of the financial condition of the bank, and received the dividends in good faith, relying on the officers of the bank, and believing the dividends were coming out of the profits.

[1] Statement abridged. Part of opinion omitted. The docket title of this case is *Hayden, Receiver*, v. *Williams*. — Ed.

Upon these facts the court desired the instruction of this court for the proper decision of the following questions:

First question. Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of the capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of the profits, and when the bank, at the time such dividend was declared and paid, was not insolvent?

[The second question is omitted.]

Edward Winslow Paige, for appellant.

Theodore De Witt (*George G. De Witt* with him), for appellees.

PECKHAM, J. . . . The complainant bases his right to recover in this suit upon the theory that the capital of the corporation was a trust fund for the payment of creditors entitled to a portion thereof, and having been paid in the way of dividends to the shareholders that portion can be recovered back in an action of this kind for the purpose of paying the debts of the corporation. He also bases his right to recover upon the terms of section 5204 of the Revised Statutes.

We think the theory of a trust fund has no application to a case of this kind. When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation.

In *Graham* v. *Railroad Company*, 102 U. S. 148, 161, it was said by Mr. Justice Bradley, in the course of his opinion, that "when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors, and a court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

And in *Hollins* v. *Brierfield Coal and Iron Company*, 150 U. S. 371, 383, 385, it was stated by Mr. Justice Brewer, in delivering the opinion of the court, and speaking of the theory of the capital of a corporation being a trust fund, as follows:

"In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the clutch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for

the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

And also:

"The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or, sometimes, even mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

Other cases are cited in the opinion as holding the same doctrine.

In *Wabash, etc., Railway Company* v. *Ham*, 114 U. S. 587, 594, Mr. Justice Gray, in delivering the opinion of the court, said:

"The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

These cases, while not involving precisely the same question now before us, show there is no well-defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question, at the time, the disposition of the property.

The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.

It is contended on the part of the complainant, however, that if the assets of the bank are impressed with a trust in favor of its creditors when it is insolvent, they must be impressed with the same trust when it is solvent; that the mere fact that the value of the assets of the corporation has sunk below the amount of its debts, although as

yet unknown to any body, cannot possibly make a new contract between the corporation and its creditors. In case of insolvency, however, the recovery of the money paid in the ordinary way without condition is allowed, not on the ground of contract to repay, but because the money thus paid was in equity the money of the creditor; that it did not belong to the bank, and the bank in paying could bestow no title in the money it paid to one who did not receive it *bona fide* and for value. The assets of the bank, while it is solvent, may clearly not be impressed with a trust in favor of creditors, and yet that trust may be created by the very fact of the insolvency, and the trust enforced by a receiver as the representative of all the creditors. But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend, in good faith believing it is paid out of profits, even though the bank at the time of the payment be in fact insolvent. That question is not herein presented to us, and we express no opinion in regard to it. We only say, that if such a dividend be recoverable, it would be on the principle of a trust fund.

Insolvency is a most important and material fact, not only with individuals but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations. Where there is no statute providing what particular act shall be evidence of insolvency or bankruptcy, it may be and it sometimes is quite difficult to determine the fact of its existence at any particular period of time. Although no trust exists while the corporation is solvent, the fact which creates the trust is the insolvency, and when that fact is established at that instant the trust arises. To prove the instant of creation may be almost impossible, and yet its existence at some time may very easily be proved. What the precise nature and extent of the trust is, even in such case, may be somewhat difficult to accurately define, but it may be admitted in some form and to some extent to exist in a case of insolvency.

Hence it must be admitted that the law does create a distinction between solvency and insolvency, and that from the moment when the latter condition is established the legality of acts thereafter performed will be decided by very different principles than in a case of solvency. And so of acts committed in contemplation of insolvency. The fact of insolvency must be proved in order to show the act was one committed in contemplation thereof.

Without reference to the statute, therefore, we think the right to recover the dividend paid while the bank was solvent would not exist.

But it is urged on the part of the complainant that section 5204 of the Revised Statutes makes the payment of a dividend out of capital illegal and *ultra vires* of the corporation, and that money thus paid remains the property of the corporation, and can be followed into the hands of any volunteer.

The section provides that "no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." What is meant by this language? Has a shareholder withdrawn or permitted to be withdrawn in the form of a dividend any portion of the capital of the bank when he has simply and in good faith received a dividend declared by a board of directors of which he was not a member, and which dividend he honestly supposed was declared only out of profits? Does he in such case within the meaning of the statute withdraw or permit to be withdrawn a portion of the capital? The law prohibits the making of a dividend by a national bank from its capital or to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. The fact of the declaration of a dividend is in effect the assertion by the board of directors that the dividend is made out of profits. Believing that the dividend is thus made, the shareholder in good faith receives his portion of it. Can it be said that in thus doing he withdraws or permits to be withdrawn any portion of the capital of the corporation? We think he does not withdraw it by the mere reception of his proportionate part of the dividend. The withdrawal was initiated by the declaration of the dividend by the board of directors, and was consummated on their part when they permitted payment to be made in accordance with the declaration. We think this language implies some positive or affirmative act on the part of the shareholder by which he knowingly withdraws the capital or some portion thereof, or with knowledge permits some act which results in the withdrawal, and which might not have been so withdrawn without his action. The permitting to be withdrawn cannot be founded upon the simple receipt of a dividend under the facts stated above.

One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge. Ought it to be said that he withdraws or permits the withdrawal by ignorantly yet in entire good faith receiving his proportionate part of the dividend? Is each shareholder an absolute insurer that dividends are paid out of profits? Must he employ experts to examine the books of the bank previous to receiving each dividend? Few shareholders could make such examination themselves. The shareholder takes the fact that a dividend has been declared as an assurance that it was declared out of profits and not out of capital, because he knows that the statute prohibits any declaration of a dividend out of capital. Knowing that a dividend from capital would be illegal, he would receive the dividend as an assurance that the bank was in a prosperous condition and with unimpaired capital. Under such circumstances we cannot think that Congress intended by the use of the expression "withdraw or permit to be withdrawn, either in the form of dividends, or otherwise," any

portion of its capital, to include the case of the passive receipt of a dividend by a shareholder in the *bona fide* belief that the dividend was paid out of profits, while the bank was in fact solvent. We think it would be an improper construction of the language of the statute to hold that it covers such a case.

We are strengthened in our views as to the proper construction of this act by reference to some of its other sections. The payment of the capital within a certain time is provided for by sections 5140 and 5141. Section 5151 provides for the individual responsibility of each shareholder to the extent of his stock at the par value thereof in addition to the amount invested therein. (These shareholders have already been assessed under this section.) And section 5205 provides for the case of a corporation whose capital shall have become impaired by losses *or otherwise*, and proceedings may be taken by the association against the shareholders for the payment of the deficiency in the capital within three months after receiving notice thereof from the Comptroller. These various provisions of the statute impose a very severe liability upon the part of holders of national bank stock, and while such provisions are evidently imposed for the purpose of securing reasonable safety to those who deal with the banks, we may nevertheless say, in view of this whole system of liability, that it is unnecessary, and that it would be an unnatural construction of the language of section 5204 to hold that in a case such as this a shareholder, by the receipt of a dividend from a solvent bank, had withdrawn or permitted to be withdrawn any portion of its capital.

We may concede that the directors who declared the dividend under such circumstances violated the law, and that their act was therefore illegal, but the reception of the dividend by the shareholder in good faith, as mentioned in the question, was not a wrongful or designedly improper act. Hence the liability of the shareholder should not be enlarged by reason of the conduct of the directors. They may have rendered themselves liable to prosecution, but the liability of the shareholder is different in such a case, and the receipt of a dividend under the circumstances is different from an act which may be said to be generally illegal, such as the purchase of stock in one national bank by another national bank for an investment merely, which is never proper. *Concord First National Bank* v. *Hawkins*, just decided, *ante*, 364.

The declaration and payment of a dividend is part of the course of business of these corporations. It is the thing for which they are established, and its payment is looked for as the appropriate result of the business which has been done. The presumption of legality attaches to its declaration and payment, because declaring it, is to assert that it is payable out of the profits. As the statute has provided a remedy under section 5205 for the impairment of the capital which includes the case of an impairment produced by the payment of a dividend, we think the payment and receipt of a dividend under

SECTION II.

Effect of Dissolution[1] *upon respective Rights of Creditors and Stockholders; and upon the Enforcement of Corporate Contracts.*

MUMMA v. POTOMAC CO.

1834. 8 *Peters*, 281.[2]

STORY, J. This is a writ of error to the circuit court of the District of Columbia, for the county of Washington. The case presented on the record is shortly this: —

The plaintiff in error, Mumma, in June, 1818, recovered a judgment against the Potomac Company, for the sum of $5,000. No steps were taken to enforce the payment of the judgment, nor any further proceedings had in relation thereto, until the 18th day of April, 1828, on which day a writ of *scire facias* was issued from the clerk's office of said court, against the said Potomac Company, to revive said judgment, which case was continued, by consent of parties, from term to term, until December term of said court, in the year 1830, at which term the following plea and statement were filed by consent of parties: "The attorneys upon the record of the said defendants now here suggest and show to the court that, since the rendition and record of said judgment, the said Potomac Company, in due pursuance and execution of the provisions of the charter of the Chesapeake and Ohio Canal Company, enacted by the States of Maryland and Virginia, and by the congress of the United States,[3] have duly signified their assent to said charter, &c., and have duly surrendered their charter, and conveyed in due form of law, to the said Chesapeake and Ohio Canal Company, all the property, rights, and privileges by them owned, possessed, and enjoyed under the same, which surrender and transfer from said Potomac Company have been duly accepted by the Chesapeake and Ohio Canal Company, as appears by the corporate acts and proceedings of said company, and final deed of surrender from the said Potomac Company, dated on the 15th day of August, 1828, duly executed and recorded in the several counties of the States of Virginia and Maryland and the District of Columbia, wherein said Potomac Company held any lands, and wherein the canals and works of said company were situated; which said corporate acts and proceedings the said attorneys

[1] As to modes of dissolution, see later chapter on that topic; also later section as to reserved power in legislature to repeal charter; also Chapter XVII., *ante*, as to forfeiture. — ED.

[2] Statement and arguments omitted. — ED.

[3] 4 Stats. at Large, 101.

here bring into court, &c., whereby, the said attorneys say, the charter of the said Potomac Company became and is vacated and annulled, and the company and the corporate franchises of the same are extinct," &c.

Whereupon, the following statement and agreement were entered into and signed by the counsel for both parties, and made a part of the record.

"The truth of the above suggestion is admitted, and it is agreed to be submitted to the court whether, under such circumstances, any judgment can be rendered against the Potomac Company upon this *scire facias*, reviving the judgment in said writ mentioned, and that reference for the said corporate acts and proceedings, and the deed in the above suggestion mentioned, be had to the printed collection of acts, &c., &c., printed and published by authority of the president and directors of the Chesapeake and Ohio Canal Company in 1828."

Upon this statement and agreement the circuit court gave judgment that the plaintiff take nothing by his writ, and the question now is whether this judgment is warranted by law.

Two points have been made at the bar. 1. That the corporate existence of the Potomac Company was not so totally destroyed by the operation of the deed of surrender as to defeat the rights and remedies of the creditors of the company. 2. That the deed of surrender violates the obligation of the contracts of the company, and that the legislative acts of Virginia and Maryland, though confirmed by the congress of the United States, are on this account void, and can have no legal effect.

We think that the agreement of the parties completely covers the first point, and precludes any examination of it. That agreement admits the truth of the suggestions in the plea of the attorneys for the Potomac Company ; and by that it is averred that the charter of the Potomac Company was duly surrendered to the Chesapeake and Ohio Canal Company, and was duly accepted by the latter; and that thereby the charter of the Potomac Company became and is vacated and annulled. And if we were at liberty to consider the last averment, not as an averment of a fact, but of a conclusion of law, the same result would follow; for the 13th section of the act of Virginia of January, 1824, incorporating the Chesapeake and Ohio Canal Company, declares that, upon such surrender and acceptance, "the charter of the Potomac Company shall be, and the same is hereby vacated and annulled, and all the powers and rights thereby granted to the Potomac Company shall be vested in the company hereby incorporated."

Unless, then, the second point can be maintained, there is an end of the cause; for there is no pretence to say that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man. We are of opinion that the dissolution of the corporation, under the acts of Virginia and Maryland, (even supposing the act of confirmation of congress out of the way,)

cannot in any just sense be considered, within the clause of the constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those States any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bonâ fide* purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws. Besides, the 12th section of the act incorporating the Chesapeake and Ohio Canal Company makes it the duty of the president and directors of that company, so long as there shall be and remain any creditor of the Potomac Company, who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company (which the act enables him to do) to pay to such creditor or creditors, annually, such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said Chesapeake and Ohio Canal Company, as the demand of the said creditor or creditors at that time may bear to the whole debt of $175,800, (the supposed aggregate amount of the debts of the Potomac Company.) So that here is provided an equitable mode of distributing the assets of the company among its creditors, by an apportionment of its revenues in the only mode in which it could be practically done upon its dissolution, a mode analogous to the distribution of the assets of a deceased insolvent debtor.

Independent of this view of the matter, it would be extremely difficult to maintain the doctrine contended for by the plaintiff in error upon general principles. A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter.

Without going more at large into the subject, we are of opinion that the judgment of the circuit court ought to be affirmed. But as there is no such corporation *in esse* as the Potomac Company, there can be no costs awarded to it.

SECTION II. — THE FUNCTIONS OF THE ASSOCIATION.

A. The Action by the Association.

(1) *The Powers of the Association.*

SECTION III.

Simple Contracts.

ROTHWELL *v.* HUMPHREYS AND HOWELL.

AT NISI PRIUS, CORAM LORD KENYON, C. J., DECEMBER 14, 1795.

[*Reported in* 1 *Espinasse*, 406.]

ASSUMPSIT for money lent. Plea of the general issue.

The defendants were partners, linen-drapers in London; the plaintiff was a fustian manufacturer at Manchester. Howell, one of the defendants, had gone down to Manchester to purchase goods in the way of his trade, and had, in fact, purchased from the plaintiff to the amount of £500. Being about to return, he borrowed £10 from the plaintiff, to defray his expenses to London; and having drawn a bill on the house in London for the amount of the goods, he included in it the £10 so borrowed, and the bill was drawn for £510.

Before the arrival of the goods in London, Humphreys and Howell the defendants, became insolvent, and the plaintiff stopped the goods *in transitu;* so that the bill was never presented, and the action was brought to recover the £10 lent only.

These facts were proved by a witness called by the plaintiff.

The defence relied upon was, that the action was brought against both partners for a loan of money, admitted, by the evidence, to have been made to one of them, and which, therefore, could not be supported.

LORD KENYON said that, though the loan of money was to one of the partners, it was lent to him while employed on the partnership business, and on its account; that as such it was competent to him to bind the partnership to the payment of a debt so contracted, and which in fact he had done by including the money lent in the same bill with that for goods sold clearly on the partnership account.

Erskine and *Wigley*, for the plaintiff.

Gibbs and *Espinasse*, for the defendants.

Verdict for the plaintiff.[1]

[1] The power of a partner in a trading partnership to borrow money for the firm is everywhere recognized. Lane *v.* Williams, *supra*, 369; Denton *v.* Rodie, *supra; Ex parte* Gellar, 1 Rose, 297; Thicknesse *v.* Bromilow, 2 Cr. & J., 425; Brown *v.* Kidger, 3 H. & N. 853; De Ribeyre *v.* Barclay, 23 Beav. 107, 125; Fisher *v.* Tayler,

SECTION IV.

Transfer of Property.

FOX AND OTHERS, ASSIGNEES, *v.* HANBURY AND OTHERS.

IN THE KING'S BENCH, MAY 17, 1776.

[*Reported in Cowper*, 445.]

AFTERWARDS, on this day, Lord Mansfield, having stated the case,[1] delivered the opinion of the court as follows: —

The question for the opinion of the court is a general one: Whether assignees, under a joint commission against two partners, taken out after the bankruptcy of both, can maintain an action of trover against a person in possession of goods under a sale or consignment *bona fide*, for a valuable consideration, and without any mixture of fraud, from one of the partners, who had not then committed any act of bankruptcy himself, but after an act of bankruptcy committed by the other partner.

An act of bankruptcy by one partner is to many purposes a dissolution of the partnership, by virtue of the relation in the statutes, which avoid all the acts of a bankrupt from the day of his bankruptcy; and from the necessity of the thing, all his property being vested in the assignees, who cannot carry on a trade.

In the case of Hague *v.* Scott,[2] cited by *Mr. Wallace* and *Mr. Buller*, it was held that the statutes concerning bankrupts made an *entire, not a partial avoidance* of the *bankrupt's* acts, as well in respect of his partner's moiety, as his own. But no case has been cited where a secret act of bankruptcy by one partner has been held to avoid an

[1] Barnes and Ridgate were partners. Ridgate committed an act of bankruptcy July 15, 1772. Barnes committed an act of bankruptcy January 22, 1773. Between those dates Barnes made consignments of tobacco, belonging to the firm, to Hanbury, a creditor of the firm. The assignees, under a joint commission of bankruptcy taken out against Barnes and Ridgate, bring an action of trover against Hanbury for a conversion of this tobacco.

This statement of the facts is an abridgment from the original report, and the arguments of counsel are omitted. The case was thrice argued, and the court took time to deliberate. — ED.

[2] Hil. 8 Geo. III. B. R.

honest conveyance of partnership effects by the other. Each has a power singly to dispose of the whole of the partnership effects.

There are no words in the statutes expressly applicable to this case; and there is great reason why they should be avoided. If partners dissolve their partnership, they who deal with either, without notice of such dissolution, have a right against both. After a dissolution by agreement, by an execution, or by a bankruptcy, the partner out of possession of the partnership effects, has the same lien on any new goods brought in which he had upon the old. But supposing that a secret act of bankruptcy of *one* partner is a complete dissolution of the partnership, and that from that moment the assignees and the solvent partner are to be considered as tenants in common of the partnership effects; the question will still remain, whether the plaintiffs have any right to recover in this action.

This leads me to consider what right in law and justice one partner has against another, after a dissolution of the partnership. It clearly is not to change the possession, or to make an actual division of specific effects. One partner may be a creditor of the partnership to ten times the value of all the effects. The other partner in that case can only have a right to an account of the partnership, and to the balance due to him, if any, on that account. No person deriving under the partner can be in a better condition. His executor stands exactly in the same light. It is the very text of Littleton. In Section 321, he says, "If there be two tenants in common of a personal chattel, and one dies, the executor shall hold and occupy with the survivor, as their testator did before he died." If a creditor takes out execution against one partner, as in 1 Salk. 392, the vendee would be tenant in common. And in the case of Skipp *v.* Harwood in Chancery, July 6, 1747, Lord Hardwicke, according to my note, says, "If a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor; and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner."

The assignees, under a commission of bankruptcy against one partner, must be in the same state. They can only be tenants in common of an undivided moiety, subject to all the rights of the other partner. This is clearly laid down in that case of Skipp *v.* Harwood, which is tolerably well reported in 1 Vezey, 239.[1] And I refer you to that report, to avoid taking up so much time as would be necessary to state it from my own notes.

My general memory of the principles explained in that case, and the

[1] It is there reported by the name of West *v.* Skip.

strong sense upon which this proposition is founded, that one partner can have no right against the other, but to what is due from him after making him all just allowances, induced me, without hesitation, to declare my opinion at the trial; that the consignments indorsed by Barnes *before* the 22d of January, 1773, the day Barnes became a bankrupt, could not be avoided by the plaintiffs, either for the *whole* or a *moiety*, on account of the bankruptcy of Ridgate. But the matter being of value, and no precedent cited, I wished them to take the opinion of the court.

When it was first argued, the defendant's counsel said little or nothing, expecting to reply; which raised doubt enough to make us order it to be put in the paper. Now that it is fully understood, we are all clearly of opinion that the action cannot be maintained.

Supposing the indorsement by Barnes of the bills of lading not to bind the undivided moiety of the assignees, which is the utmost the plaintiffs can contend for, then this is an action of trover, by one tenant in common against another, which cannot be. The text of Littleton says so, Coke's comment says so, the adjudged cases say so, and there is no judgment or *dictum* to the contrary. The text of Littleton, sect. 323, is as follows: "But if two be possessed of chattels personal in common, and one take the whole to himself out of the possession of the other, the other has no remedy but to take this from him who hath done the wrong, to occupy in common, &c., when he can see his time, &c." Lord Coke, in his comment on this passage, 200 *a*, says, "If one tenant in common takes all the chattels personal, the other has no remedy by action; but he may take them again."

So in Brown *v.* Hedges.[1] Upon a case made for the opinion of the court, the second point resolved was this: "One joint tenant, tenant in common, or parcener, cannot bring trover against another, because the possession of one is the possession of both; if he does, it is good evidence upon not guilty. But if one joint-tenant bring trover against a stranger, in that case the defendant may plead it in abatement; but cannot take advantage of it in evidence." The reason is unanswerable; there is no conversion.

Upon these authorities we are of opinion that the action cannot be maintained; and consequently, that the consignments *prior* to the 22d of January, 1773, are not to be brought into the arbitrator's accounts.[2]

[1] Trin. 7 Ann. B. R. 1 Salk. 290.

[2] The power of a solvent partner to transfer firm property in the course of winding up the partnership is well established.

Transfer by sale. — Morgan *v.* Marquis, 9 Ex. 145; Lewis *v.* White, 2 New Reports, 81; Murray *v.* Murray, 5 Johns. Ch. 60 (*semble*); Browning *v.* Marvin, 22 Hun, 547 (*semble*).

Transfer in payment of debts. — Smith *v.* Goddard, 3 B. & P. 465; Smith *v.*

ISAAC PATCH *v.* GEORGE WHEATLAND AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY, 1864.

[*Reported in* 8 *Allen*, 102.]

CONTRACT brought against the assignees of the estate of George F. Wonson, Samuel G. Wonson, Jr., and William S. Wonson, partners under the firm of George F. Wonson & Brothers, insolvent debtors, to recover the amount received by them upon the sale of vessels formerly owned by the firm. It was agreed, in the superior court, that George F. Wonson executed mortgages of the vessels in controversy to the plaintiff, signing them with his own name and the individual names of his partners, without their personal knowledge, but for the benefit of

the notion that the validity of the indorsement as a transfer would imply its validity as a contract, a consequence at variance with the rule that a partner cannot contract for the partnership after its dissolution.

Accordingly, if the title of a bill belonging to the firm can be transferred without imposing a contract liability upon the firm, the bill may be transferred by a partner after dissolution of the partnership as freely as any other firm asset. *E. g.* : —

(1.) A bill payable to a partner as trustee for the firm. Harvey *v.* Crickett, 5 M. & Sel. 336.

(2.) A bill payable to the firm, indorsed after the death of a partner by the surviving partners. Johnson *v.* Berlizheimer, 84 Ill. 54 ; Jones *v.* Thorn, 14 Mart. 463 ; Bredow *v.* Mutual Institution, 28 Mo. 181 (but see Mutual Institution *v.* Enslin, 37 Mo. 453.) It was decided in Glasscock *v.* Smith, 25 Ala. 474 (see also Fowle *v.* Harrington, 1 Cush. 146), that an indorsement by the survivors in the firm name did not transfer the legal title. But this decision will hardly command approval, and is at variance with the reasoning in Commercial Bank *v.* Proctor, 98 Ill. 558 ; Cavitt *v.* James, 39 Tex. 189 ; Douglass *v.* Hall, 22 Vt. 451.

The surviving partner may draw checks upon the firm account, and the bank may properly pay the checks. Backhouse *v.* Charlton, 8 Ch. D. 444 ; Bank of New York *v.* Vanderhorst, 32 N. Y. 553.

(3.) A bill payable to the firm, indorsed after its dissolution by a partner in the firm name "without recourse." See Waite *v.* Foster, 33 Me. 424 ; Yale *v.* Eames, 1 Met. 486 ; Fellows *v.* Wyman, 33 N. H. 351, 356.

(4.) A bill belonging to the firm and negotiable by delivery merely. Parker *v.* Macomber, 18 Pick. 505. But see, *contra*, McDaniel *v.* Wood, 7 Me. 543.

If the indorsement in the firm name is made under such circumstances as to charge the firm as an indorser, it will of course transfer the title ; *e. g.*, an indorsement after dissolution by act of the parties, or by act of bankruptcy, to one who has no knowledge of the dissolution. Cony *v.* Wheelock, 33 Me. 366. The dictum to the contrary in Ramsbottom *v.* Lewis, 1 Camp. 279, cannot be relied upon. See *supra*, 547, note 1. — ED.

the firm. Upon these facts judgment was rendered in the superior court for the plaintiff, and the defendants appealed to this court.

G. Wheatland, for the defendants, submitted the case without argument.

C. P. Thompson, for the plaintiff.

BIGELOW, C. J. The power of one copartner to make and execute a valid transfer, either absolute or conditional, of a ship, vessel, or other personal property belonging to the firm, is clear and unquestionable, and has been often recognized and affirmed by this court. Lamb *v.* Durant;[1] Tapley *v.* Butterfield;[2] Milton *v.* Mosher.[3]

That this power was well executed in the present case, we cannot doubt. One of the copartners, having authority to pass a valid title to the vessels by bill of sale, as incident thereto could execute them in any form or mode by which such title could be legally transferred. It is quite immaterial whether it was done by signing the name of the firm or the name of each copartner separately.

A very different question would arise if one copartner should undertake to sign the separate names of his copartners to any contract, promise, or agreement, by which a separate or individual or a new and additional liability might be created or assumed.

Judgment for the plaintiff.[4]

[1] 12 Mass. 54. [2] 1 Met. 515. [3] 7 Met. 244.

[4] POWER OF PARTNER TO TRANSFER FIRM PROPERTY, — BEFORE DISSOLUTION. — The power of a partner to transfer firm property during the continuance of the partnership as a going concern is universally recognized.

Sales. — Lambert's Case, Godb. 224; De Tastet *v.* Carroll, 1 Stark. 88; Dove *v.* Wilkinson, 2 Stark. 287; *Ex parte* Howden, 2 M. D. & D. 574; Lyles *v.* Styles, 2 Wash. C. C. 224; Anderson *v.* Tompkins, 1 Brock. 456; Harrison *v.* Sterry, 5 Cranch, 289; Halstead *v.* Shepard, 23 Ala. 558; Hyrschfelder *v.* Keyser, 59 Ala. 338; Mills *v.* Barber, 4 Day, 428; Shaw *v.* McDonald, 21 Ga. 395; Commercial Bank *v.* Proctor, 98 Ill. 558; Randolph Bank *v.* Armstrong, 11 Iowa, 515; Paton *v.* Baker, 62 Iowa, 704; Barker *v.* Mann, 5 Bush, 672; Staples *v.* Sprague, 75 Me. 458; Lamb *v.* Durant, 12 Mass. 54; Arnold *v.* Brown, 24 Pick. 89; Whitten *v.* Hulbert, Freem. Ch. (Miss.) 231; Commercial Bank *v.* Lewis, 21 Miss. 226; Cayton *v.* Hardy, 27 Mo. 536 (*semble*); Clark *v.* Rives, 33 Mo. 579; Boswell *v.* Green, 1 Dutch. 390; Everit *v.* Strong, 5 Hill, 163; Hudson *v.* McKenzie, 1 E. D. Sm. 358; Avery *v.* Fisher, 28 Hun, 508; Dubois's Appeal, 38 Pa. 231; Sale *v.* Dishman, 3 Leigh, 548; Forkner *v.* Stuart, 6 Grat. 197; Clark *v.* Hogeman, 13 W. Va. 718; Howell *v.* M'Farland, 2 Ont. Ap. 31.

Mortgages and Pledges. — Barton *v.* Williams, 5 B. & Al. 395, 405; Gordon *v.* Ellis, 7 M. & G. 607; Hawkins *v.* Hastings Bank, 1 Dill. 462; Cullum *v.* Bloodgood, 15 Ala. 34; Gates *v.* Bennett, 33 Ark. 475; Nelson *v.* Wheelock, 46 Ill. 25; Richardson *v.* Lester, 83 Ill. 55; Fromme *v.* Jones, 13 Iowa, 474; Hodges *v.* Harris, 6 Pick. 360; Milton *v.* Mosher, 7 Met. 244; Patch *v.* Wheatland, *supra*, 572; Keegan *v.* Cox, 116 Mass. 289; Keck *v.* Fisher, 58 Mo. 532; Galway *v.* Fullerton, 17 N. J. Eq. 389; Willett *v.* Stringer, 17 Abb. Pr. 152; Arnold *v.* Morris, 7 Daly, 498; Crozier *v.*

entered into during its continuance. The true solution of the question is, that if the plaintiff had reason to complain of the acts of his partner, his proper course was to apply to this Court for a receiver.

The appeal must be dismissed with costs.

The Lord Justice KNIGHT BRUCE concurred.[1]

IN RE CLOUGH.

BRADFORD COMMERCIAL BANKING COMPANY *v.* CURE.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, BEFORE NORTH, J.

[*Reported in* 31 *Chancery Division*, 324.]

JOHN CURE and Jonathan Clough were partners in business at Bradford, and had deposited with the Bradford Commercial Joint Stock Banking Company title-deeds to certain property, with a memorandum of deposit, by which they agreed to execute a mortgage to the banking company for the balance which at any time might be due to the banking company. Clough died in November, 1883, at which time the partners owed the banking company £6118. The banking company were not aware of the death of Clough until April, 1884, when £6125 was due to the banking company, and they applied to Cure, the surviving partner, for payment or further security. He thereupon deposited with them a contract for the sale of certain land to the partners (on which land they had erected buildings and had carried on their business) with a memorandum of deposit.

The banking company in February, 1885, brought this action against

[1] POWER TO COMPLETE UNFINISHED BUSINESS. — Each partner has, after the dissolution of the partnership, the power to complete transactions entered upon before dissolution. *E. g.* : —

Sales of goods consigned. — Wells *v.* Ross, 7 Taunt. 403; Offutt *v.* Scott, 47 Ala. 104; Johnson *v.* Totten, 3 Cal. 343; Dickson *v.* Indianapolis Co., 63 Ind. 9; Holden *v.* McFaul, 21 Mo. 215; Dean *v.* McFaul, 23 Mo. 76; Briggs *v.* Briggs, 15 N. Y. 471; Heberton *v.* Jepherson, 10 Barr. 124. See also Western Co. *v.* Walker, 2 Iowa, 504.

Execution of guaranty pursuant to contract. — Star Co. *v.* Swezey, 52 Iowa, 391, 59 Iowa, 609.

Miscellaneous transactions. — Ault *v.* Goodrich, 4 Russ. 430; Downs *v.* Allen, 23 Blatchf. 54; McGill *v.* McGill, 2 Met. (Ky.), 258; Wilkinson *v.* Griswold, 20 Miss. 669; Holmes *v.* Shand, 27 Miss. 40; Sinclair *v.* Galland, 8 Daly, 508; Calvert *v.* Miller, 94 N. Ca. 600; Tompkins *v.* Tompkins, 18 S. Ca. 1; Caldwell *v.* Stileman, 1 Rawle, 212; Pool *v.* Gist, 4 McCord, 259.

Compare Oliver *v.* Forrester, 96 Ill. 315; Roberts *v.* Kelsey, 38 Mich. 602. — ED.

Cure and against W. Clough, administrator of Jonathan Clough, and against the heir of Jonathan Clough, claiming an account and payment, and a sale of the securities, and, if necessary, administration of the estate of Jonathan Clough.

Fischer, Q.C., and *J. G. Wood*, for the banking company. The administrator of Jonathan Clough alleges that Cure, as surviving partner, had no power to mortgage the assets of the firm, but he clearly had power. He was continuing the business, and the banking company were pressing, and could have sued, and by this means he obtained time to get in the assets and pay the debts. Butchart *v.* Dresser.[1] No harm was done to any one.

Eyre, for Cure, supported the banking company.

G. Williamson, for the administrator of Jonathan Clough. This was a preference of a creditor, and the Court cannot make an order affecting the creditors who are not represented here. Cure had no right to deal with the assets of the partnership in this way, — Lindley on Partnership,[2] — and actually to dispose of the place of business.

NORTH, J. I do not entertain any doubt about this case. The question is simply whether a surviving partner can, after the death of his copartner and the consequent dissolution of the firm, deposit any of the assets of the partnership by way of security for a debt due from the partnership.

It is clear that the debt was created in the lifetime of the deceased partner, and, according to Butchart *v.* Dresser, if the surviving partner had made the deposit in exchange for a present advance for partnership purposes, beyond all question it would have been good. The only difference between the cases is that here no present advance was made in return for the deposit. Now, of course, if the deposit was not made in good faith, the transaction could not be maintained, nor if it appeared that the security was given for a private debt of the surviving partner;[3] but here I am dealing with the case of a *bona fide* deposit, made in consequence of an application by a creditor to the surviving partner immediately after the creditor had heard of the death of the other partner. Next day the security was given, accompanied by a note: "We hand you contract dated 19th March, 1868, for purchase from Mr. Horsfall, which we lodge with you as a further security; and you are to have the same rights as if the contract had been lodged with you, together with the title-deeds you already hold, and had been included in the memorandum of deposit then signed." Now by this

[1] 4 D. M. & G. 542.

[2] 4th ed. pp. 409, 413.

[3] Knox *v.* Gye, *supra*, 169; Gable *v.* Williams, 59 Md. 46; Allen *v.* Second Bank, 6 Lea, 558, *accord*. — ED.

transaction no present consideration in the shape of an advance of money was obtained, but it is suggested that time was obtained, and that the creditor was induced to abstain from doing what he might otherwise have done, namely, realizing the securities which he had already got. It is quite true that no further definite time was given, but of course the whole object of the further security was that something should be given in return, and that meant time. The bank was not bound to any definite time, but the effect of the transaction was to obtain a reasonable time, and the obtaining a reasonable time was held by the Court of Exchequer Chamber in Oldershaw *v.* King[1] to be a sufficient consideration for a further guarantee.

But then the question is whether a surviving partner has power to make such a deposit. Now in the case of *In re* Patent File Company,[2] the question arose as to the power of the directors of a company to deposit title-deeds belonging to the company, as a security for a past advance, and it was held that they had such power. The observations made by the Lord Justice MELLISH apply very appropriately to this case: "There being nothing in the articles to prohibit the giving such a security, I am of opinion that the company can give it as well for a past debt as a future one. In fact, the case is stronger in favor of a security for a past debt, as it would be absurd to say that a company has not power to pay past debts; and if so, why should it be debarred from giving security, which is one way of applying its property in payment of its debts." It is clear that the surviving partner could have paid off, out of the assets of the firm, any existing debt, and therefore he could equally well satisfy any creditor by giving security upon a part of the assets.

It seems to me, therefore, that the surviving partner was justified in what he did; and that the bank obtained a valid charge.[3]

[1] 2 H. & N. 517.

[2] Law Rep. 6 Ch. 83, 88.

[3] POWER OF TRANSFER AFTER DISSOLUTION BY DEATH. — When a partnership is dissolved by the death of one of its members, any one of the survivors may transfer the firm property for the purpose of winding up the business. *E. g.*: —

Sales. — Andrews *v.* Brown, 21 Ala. 437; Lang *v.* Waring, 25 Ala. 625 (*semble*); Murphy *v.* Abrams, 50 Ala. 293; Dupuy *v.* Leavenworth, 17 Cal. 262 (*semble*); Wilson *v.* Loper, 13 B. Mon. 411; Willson *v.* Nicholson, 61 Ind. 241; Rossum *v.* Sinker, 12 C. L. J. 202 (Indiana); Galbraith *v.* Gedge, 16 B. Mon. 631; Buffum *v.* Buffum, 49 Me. 108 (but see now Hill *v.* Treat, 67 Me. 501, statutory); Pinckney *v.* Wallace, 1 Abb. Pr. 82; Delmonico *v.* Guillaume, 2 Sandf. Ch. 366; Davy *v.* Ericsson, 45 N. Y. 786; McAlister *v.* Montgomery, 3 Hayw. 94; Solomon *v.* Fitzgerald, 7 Heisk. 552; Allen *v.* Nat. Bank, 6 Lea, 558 (*semble*).

See further Warr *v.* Jones, 24 W. R. 693; Manck *v.* Manck, 54 Ill. 281; Whitney *v.* Cotten, 53 Miss. 689.

Transfer by way of Payment or Security to a Firm Creditor. — Bohler *v.* Tappan,

SANFORD v. MICKLES AND FORMAN.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, MAY, 1809.

[*Reported in* 4 *Johnson*, 224.]

THIS was an action of assumpsit. The declaration contained two counts; one on a promissory note, dated the 14th June, 1806, given by the defendants to Brown and Olmstead, for 1,249 dollars and 56 cents, payable on demand, and indorsed by Brown and Olmstead, to the plaintiff. The second count was for money had and received, to the use of the plaintiff. Plea, non-assumpsit, with notice of set-off. The cause was tried at the Onondaga circuit, in September, 1808. The note was signed S. Brown, Jr., for Mickles & Co., and his authority to make the note was proved.

The indorsement on the note was in the hand-writing of Olmstead, and in the words following: "November 15, 1808. Pay the contents to Benjamin Sanford. William Olmstead, for the late firm of Brown and Olmstead." The partnership of Brown and Olmstead had been dissolved by mutual consent before the indorsement was made. At the time of the dissolution it was agreed that Olmstead should take the stock in trade, collect and receive the outstanding debts, and pay the debts due by the partnership; but no authority to indorse notes, or to use the name of the firm in any manner, was shown. The defendants' counsel objected that Olmstead having no authority to indorse the copartnership name after a dissolution of partnership, the plaintiff could not recover on the note; but this objection was overruled. Several payments were indorsed on the note, the last of which was on the 25th October, 1806. The jury found a verdict for the plaintiff, for the balance due on the note, after deducting the payments indorsed.

On the motion to set aside the verdict, and for a new trial, the question[1] was raised, —

Whether one partner, after a dissolution of the partnership, can indorse a note given to the firm, so as to enable the indorsee to maintain an action in his own name against the firm.

Kirkland, for the defendant, as to the first point, cited Lansing *v.* Gaine & Ten Eyck;[2] Hackley *v.* Patrick;[3] Kilgour *v.* Finlyson and others;[4] and Abel *v.* Sutton.[5]

[1] Another question, whether the transfer of the note was so long delayed as to let in equitable defences, was decided in the negative. The portion of the report relating to that question is omitted. — ED.

[2] 2 Johns. Rep. 302.

[3] 3 Johns. Rep. 536.

[4] 1 Hen. Black. 155.

[5] 3 Esp. Cases, 108.

Gold, contra. The indorsement in the name of the firm or the payees, by one of the partners, was merely to enable the plaintiff to recover in his own name. It created no new responsibility on the part of the partners. The objection does not lie in the mouth of the party, who is subjected to no new responsibility. The authority of Olmstead to indorse the copartnership name, necessarily arose from the transfer of the partnership stock and outstanding debts to him. In the cases cited, the indorsement went to create a new responsibility.

YATES, J., delivered the opinion of the court. The authority which exists during the continuance of a partnership, from one partner to bind his copartner, ceases on its dissolution; and with respect to antecedent debts contracted during the partnership, the power to receive payments and give discharges rests on the same principle with that of joint obligees or payees of a note, not otherwise connected as partners. The cases cited have been determined with a view of protecting one partner from a responsibility which might be created against him, in consequence of the negotiation of bills by the other, after the dissolution. It is impossible to separate the right to indorse a bill by one, passing the title, from the legal responsibility on all those having an interest in it.

The decided manner in which Lord KENYON denies the right of one partner, after a dissolution of the partnership, to indorse bills given before, if he even had authority to settle the partnership accounts, induces me to believe the doctrine as settled. It would be a peculiar hardship to put a partner, retired from the whole concern, so completely in the power of the other, as to charge him, by negotiating bills given during the partnership. This power being denied, it follows that they must all join in the transfer of a bill negotiated after the dissolution, for the purpose of vesting the title in the indorsee. The court are, therefore, of opinion, that the verdict must be set aside, and a new trial be granted.[1] *New trial granted.*

[1] Smith *v.* Winter, 4 M. & W. 454 (*semble*); Leonard *v.* Wildes, 36 Me. 265 (*semble*); Parker *v.* Macomber, 18 Pick. 505; Yale *v.* Eames, 1 Met. 486 (*semble*); Fellows *v.* Wyman, 33 N. H. 351; Dickerson *v.* Wheeler, 1 Humph. 51, *accord.*

Similarly, after a partnership has been dissolved by the bankruptcy of a partner, one of the partners cannot by indorsement transfer the legal title in a bill owned by the firm to one who has knowledge, actual or constructive, of the act of bankruptcy. Ramsbottom *v.* Duck, 1 Mont. Part. (2d ed.) Notes, 135; Mechanics' Bank *v.* Hildreth, 9 Cush. 356, 359 (*semble*).

There is no reason why an indorsement like that in the principal case, or an indorsement by a solvent partner after the dissolution of the partnership by the bankruptcy of one of its members, should not be effective as an assignment to transfer the beneficial interest in the bill. The inability of the partner to transfer the legal title by an indorsement in such cases results not from the nature of the property, but from

CHAPTER VII.

INTERPRETATION OF CHARTERS.

DOWNING *v.* MOUNT WASHINGTON ROAD CO.

1860. 40 *New Hampshire*, 230.

Assumpsit, brought by Lewis Downing & Sons, to recover the price of eight omnibuses, and a model for the same, one light wagon, and one baggage wagon, made for the defendants, under a contract entered into by D. O. Macomber, president of the defendant corporation, in their behalf.

The light wagon was made and sent to one Cavis, the agent for building the road, and was used by him in making it. The omnibuses and baggage wagon were intended to be used in conveying passengers up and down the mountain, after the road was completed. The omnibuses were constructed in a peculiar way, and are not fit for use on ordinary roads.

By their act of incorporation, passed July 1, 1853, the corporation was empowered to lay out, make and keep in repair, a road from such point in the vicinity of Mt. Washington as they may deem most favorable, to the top of said mountain, &c., and thence to some point on the northwesterly side of said mountain, &c., to take tolls of passengers and for carriages, to build and own toll-houses, and to take land for their road.

The corporation was duly organized, and at a meeting of the directors on the 31st of August, 1853, before said contract was made, it was "voted that the president be the legal agent and commissioner of the company;" and his compensation as such was fixed.

"The president" was "directed to proceed with the letting of the work for the construction of the road," "the obtaining the right of way," and "what other action he shall deem proper, for the interests of the company," &c.

A committee was appointed "to settle in relation to the right of way, &c., and in relation to land on which to build stables and other buildings, for the use of the road, and also for building all such stables and houses as may be necessary for the operations of the company."

It appeared that by an additional act, passed July 12, 1856, the corporation were authorized "to erect and maintain, lease and dispose of any building or buildings, which may be found convenient for the accommodation of their business, and of the horses and carriages and travelers passing over said road."

The defendants denied the authority of Macomber to make such a contract in behalf of the corporation, and the power of the corporation under its charter either to authorize or enter into such a contract.

Kittredge & Bellows, for the plaintiffs.

George & Foster, for the defendants.

BELL, C. J.[1] Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established. *Trustees* v. *Peaslee*, 15 N. H. 330; *Perrine* v. *Chesapeake Canal Co.*, 9 How. 172. In giving a construction to the powers of a corporation, the language of the charter should in general neither be construed strictly nor liberally, but according to the fair and natural import of it, with reference to the purposes and objects of the corporation. *Enfield Bridge* v. *Hartford R. R.*, 17 Conn. 454; *Strauss* v. *Eagle Co.*, 5 Ohio (N. S.) 39.

If the powers conferred are against common right, and trench in any way upon the privileges of other citizens, they are, in cases of doubt, to be construed strictly, but not so as to impair or defeat the objects of the incorporation.

In the present case the power to take the lands of others, and to take tolls of travelers, must be strictly construed, if doubts should arise on those points; but it is not seen that the other grants to the defendant corporation should not receive a fair and natural construction.

The charter of the Mount Washington Road empowers them to lay out, make and keep in repair, a road from Peabody River Valley to the top of Mount Washington, and thence to some point on the northwest side of the mountain. It grants tolls on passengers and carriages, and authorizes them to take lands of others for their road, and to build and own toll-houses, and erect gates, and appoint toll-gatherers to collect their tolls. The remaining provisions contain the ordinary powers of corporations, relating to directors, stock, dividends, meetings, &c. Laws of 1853, chapter 1486.

This charter confers the usual powers heretofore granted to turnpike corporations, and no others. The most natural and satisfactory mode of ascertaining what are the powers incidentally granted to such companies, is to inquire what powers have been usually exercised under them, without question by the public or by the corporators. It may be safely assumed that the powers which have not heretofore been found necessary, and have not been claimed or exercised under such charters, are not to be considered generally as incidentally granted.

[1] BELLOWS, J., did not sit.

Such charters have in former years been very common in this and other States, and they have not, so far as we are aware, been understood as authorizing the corporations to erect hotels, or to establish stage or transportation lines, to purchase horses or carriages, or to employ drivers in transporting passengers or freight over their roads; and no such powers have anywhere been claimed or exercised under them. We are, therefore, of opinion that the power to establish stage and transportation lines to and from the mountain, to purchase carriages and horses for the purpose of carrying on such a business, was not incidentally granted to the defendant corporation by their charter. *State* v. *Commissioners*, 3 Zab. 510.

But it is contended that the power to make this contract is conferred by the act in amendment of the charter, passed July 12, 1856. By this act the corporation may "erect and maintain, lease and dispose of any building or buildings which may be found convenient for the accommodation of their business, and of the horses and carriages and travelers passing over their said road." By *their business*, which the buildings to be erected were designed to accommodate, it is said the legislature must have intended some permanent and continuing business beyond that of merely building and maintaining a road; and that it could be no other than that of erecting a hotel on the mountain, and establishing lines of carriages, for the purpose of carrying visitors up and down the mountain.

But the foundation of this implication is very slight. The express grant is of an authority to erect, &c., buildings, not of all kinds, but such as may be found convenient for the accommodation of their business, and of travelers, &c. The business here referred to must be understood to be such as they are by their charter authorized to engage in. If nothing had been said of horses and travelers, there could hardly be any foundation for the idea that a hotel could have been contemplated by the legislature. Buildings suitable for the accommodation of their toll-gatherers and workmen employed on their road, would probably be thought every thing the legislature intended to authorize by this additional act. Connected as this authority now is with travelers, horses and carriages, there is scarce a pretence for argument, that this additional act goes any further than the original act, to authorize a stage and transportation company. It is not unlikely that some of the projectors of this enterprise intended to secure much more extensive rights than those of a turnpike and hotel company, but it seems certain they have not exhibited this feature of their case to the legislature so distinctly as to secure their sanction, and the charter and its amendment as yet justifies them in no such claim.

The power of buying and selling real and personal property for the legitimate purposes of the corporation, and the power of contracting generally for the same purposes, within the limits prescribed by the charter, being granted, we understand the principle to be, that their

purchases, sales, and contracts generally, will be presumed to be made within the legitimate scope and purpose of the corporation, until the contrary appears, and that the burden of showing that any contract of a corporation is beyond its legitimate powers, rests on the party who objects to it. *Indiana* v. *Woram*, 6 Hill 37; *Ex parte Peru Iron Company*, 7 Cow. 540; *Farmer's Loan* v. *Clowes*, 3 Comst. 470; *Same* v. *Curtis*, 3 Seld. 466; *Biers* v. *Phenix Company*, 14 Barb. 358.

If a corporation attempt to enforce a contract made with them in a case beyond the legitimate limits of their corporate power, that fact being shown, will ordinarily constitute a perfect defence. *Green* v. *Seymour*, 3 Sandf. Ch. 285; *Bangor Boom* v. *Whiting*, 29 Me. 123; *Life &c. Company* v. *Manufacturers &c. Company*, 7 Wend. 31; *New-York &c. Insurance Company* v. *Ely*, 5 Conn. 560.

And if a suit is brought upon a contract alleged to be made by the corporation, but which is shown to be beyond its corporate power to enter into, the contract will be regarded as void, and the corporation may avail themselves of that defence. *Beach* v. *Fulton Bank*, 3 Wend. 573; *Albert* v. *Savings Bank*, 1 Md. Ch. Dec. 407; *Abbot* v. *Baltimore &c. Company*, 1 Md. Ch. Dec. 542; *Strauss* v. *Eagle Insurance Company*, 5 Ohio (N. S.) 59; *Baron* v. *Mississippi Insurance Company*, 31 Miss. 116; *Bank of Genesee* v. *Patchin Bank*, 3 Kern. 315; *Gage* v. *Newmarket*, 18 Q. B. 457.

The contract set up in this case was made not by the corporation itself, by a vote, nor by an agent expressly authorized to sign a contract already drawn, but it was made by the president of the corporation, acting under an appointment as their general agent; and it is argued that he was fully authorized by votes of the corporation to bind them by such a contract as the present; but it is not necessary to consider this question, as we think it settled that the powers of the agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. This principle is distinctly recognized in *McCullough* v. *Moss*, 5 Den. 567; overruling the case of *Moss* v. *Rossie Lead Co.*, 5 Hill 137, and in *Central Bank* v. *Empire Co.*, 26 Barb. 23; *Bank of Genesee* v. *Patchin Bank*, 3 Kern. 315.

The same want of power to give authority to an agent to contract, and thereby bind the corporation in matters beyond the scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make. 5 Den. 567, above cited. The power of the agent must be restricted to the business which the company was authorized to do. Within the scope of the business which they had power to transact, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized, for its powers extend no further.

CHAPTER VIII.

POWERS USUALLY IMPLIED.[1]

SECTION I.

Power to Acquire Property by Purchase.

STOCKTON SAVINGS BANK *v.* STAPLES ET UX.

1893. 98 *California*, 189.[2]

VANCLIEF, C. Action to quiet title to an undivided half of a quarter section of land situate in the county of San Joaquin. The judgment was in favor of the plaintiff, and defendants have appealed therefrom, and from an order denying their motion for a new trial. Robert Coffee, who is admitted to have been the source of title, conveyed an undivided half of the quarter section to the defendant Mary P. Staples in March, 1870; and it is not disputed that she remained a tenant in common with him until the 2d day of June, 1875, at which time it is claimed by plaintiff that he ousted her, and thence maintained a continuous adverse possession of her interest until September 11, 1888, when he conveyed the whole quarter section to Alice L. Hudson, who continued the adverse possession until September 20, 1890, when she conveyed the entire quarter section to the plaintiff. This action was commenced October 15, 1890. The court found all the essential elements of a continuous adverse possession by Robert Coffee, Alice L. Hudson, and

[1] ". . . There is probably not a single act of incorporation among the thousands that are to be found in our statute book, which does not contain some grant of power, or some restriction, which the corporation thereby created would have taken or been subjected to, if the charter had been silent on the subject. In the charter before me, (and in every other granted before the Revised Statutes, that I recollect to have examined, there are similar provisions,) it is enacted that this body corporate may have continual succession, and be capable in law of suing and being sued, and may have a common seal; all of which rights were conferred by the simple expression, that it was created a *body corporate*.

". . . The inference from the express grant of this power or right in one charter or act, that the power is not incident to another corporation of a different class, is therefore very feeble."

SANDFORD, Vice-Chancellor, in *Barry* v. *Merchants' Exchange Co.*, (A. D. 1844,) 1 Sandf. N. Y. Chancery, 280, p. 295. — ED.

[2] Only part of the opinion is given. — ED.

plaintiff, except notice to Mary P. Staples of its hostile character, from June 2, 1875, until the commencement of this action; and further found, substantially, that Mary P. Staples had actual notice of the adverse and hostile character of such possession from 1884 until the commencement of this action. Thus it appears that the title upon which plaintiff recovered was found to have been acquired by prescription.

. . . . . .

Appellants contend that the court erred in overruling their objections to the introduction in evidence of the deed from Mrs. Hudson to plaintiff. The ground of the objection was that the plaintiff "was not shown to have the power to purchase, hold, or receive said land, nor that said land was conveyed to it for any of the purposes of the corporation." There was no evidence to show for what purpose the corporation had been organized, or what business it was conducting. The court found according to the allegation of the complaint, not denied in the answer, that at all the times stated the plaintiff "was a corporation duly organized and incorporated under and by virtue of the laws of the state of California, and having its office and principal place of business in the city of Stockton, county of San Joaquin, state of California." Under these circumstances I think it must be presumed (as against the defendants, at least) that the corporation had power to purchase and hold the land. Mining Co. v. Clarkin, 14 Cal. 545; Evans v. Bailey, 66 Cal. 112; Hagar v. Board, 47 Cal. 222; People v. La Rue, 67 Cal. 526; Spel. Priv. Corp. §§ 203, 206. It does not appear under what statute, or for what purpose, the plaintiff was incorporated, nor what business it was engaged in, nor for what purpose the property was purchased or used. In answer to a similar objection in People v. La Rue, supra, it was said: "If there was anything in its charter, or the business in which it was engaged, or in the law under which it was organized, in any manner abridging its right to hold land, it does not appear of record; hence we deem the objection untenable."[1]

. . . . . .

BELCHER C. and TEMPLE C. concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

GAROUTTE J., PATERSON J., HARRISON J.

Hearing in Bank denied.

[1] In *People* v. *La Rue*, the passage above quoted is preceded by these sentences.

It is said by Angell & Ames on Corporations, at section 110, that "both by the laws of England and the United States, there are several powers and capacities which tacitly and without any express provision are considered inseparable from every corporation." Kyd enumerates five of these as necessarily and inseparably belonging to *every* corporation.

In enumerating them, the third in number is the right or power "to purchase lands and hold them for the benefit of themselves and their successors."

The presumption is that the corporation in question had the right to purchase and hold the lands by it represented.

SECTION III.

Power to Alienate.[1] *Power to Mortgage.*

1 KYD ON CORPORATIONS, 1st ed., A. D. 1793, pp. 107, 108. Having considered the capacity of corporations to *take* property, we are naturally led, in the next place, to treat of the power they have to *dispose* of it.

All *civil* corporations, such as the corporations of mayor and commonalty, bailiffs and burgesses of a town, or the corporate companies of trades in cities and towns, and all corporations established by act of parliament for some specific purpose, unless expressly restrained by the act which establishes them, or by some subsequent act, have, and always have had an unlimited control over their respective properties, and may alienate in fee, or make what estates they please for years, for life, or in tail, as fully as any individual may do with respect to his own property.

AURORA, &c. SOCIETY *v.* PADDOCK.

1875. 80 *Illinois*, 264.[2]

CRAIG, J. This was a bill in equity, brought by appellees, to foreclose a mortgage executed by the Aurora Agricultural and Horticultural Society of Aurora, on the 28th day of December, 1870, to secure the payment of $6000 loaned by John R. Coulter to the society. The court, on a hearing of the cause, rendered a decree directing a sale of the mortgaged premises in satisfaction of the mortgaged debt.

The society has prosecuted this appeal, and in order to obtain a reversal of the decree, it is insisted by the counsel for appellant:

First — That the society had no power whatever to mortgage.

Second — That the mortgage in question was wholly unauthorized.

The appellant was organized on the 6th day of March, 1869, under an act approved Feb. 15, 1855, which authorized the incorporation of agricultural societies. (Gross' Statutes, 1869, page 119.) By the third section of the act, the society was made a body corporate, with power to sue and be sued, to acquire and hold real estate not exceeding five hundred acres, to construct the necessary improvements and

[1] As to involuntary alienation see *post*, chapter as to rights and remedies of creditors against corporate property and franchises. — ED.

[2] Statement, and part of opinion, omitted. — ED.

buildings for its purpose, to have and employ capital, machinery, live stock, etc., not exceeding in value $10,000.

While it is true, no section of the act confers direct authority upon the society to sell or mortgage its property, except upon a dissolution of the corporation, yet the act does not prohibit or restrict the society from selling or giving a mortgage upon its real estate. The power to mortgage, when not expressly given or denied, must be regarded as an incident to the power to acquire and hold real estate and make contracts.

We understand it to be the common law rule, that corporations have an incidental right to alien or dispose of their lands and personal property, unless specially restrained by the act under which they are organized or by statute.

It is said in Angell & Ames on Corporations, p. 153: "Independent of positive law, all corporations have the absolute *jus disponendi* neither limited as to objects nor circumscribed as to quantity." The same doctrine is clearly laid down by Kent, vol. 2, page 280.

We are, therefore, of opinion, as the society was not prohibited from mortgaging its lands, it possessed the power to do so as an incident to the power to purchase and hold real estate and make contracts.

. . . . . .

Decree affirmed.

MORISETTE (PLAINTIFF IN ERROR) *v.* HOWARD.

Supreme Court of Kansas, 1901. 63 *Pacific Reporter*, 756.

JOHNSTON, J. This action was brought by W. H. Howard, trustee, to recover the possession of a stock of merchandise from A. Morisette, sheriff of Cloud county, who had seized it as the property of the Clyde Mercantile Company, at the instance of the creditors of that company. After the action was begun, Fannie L. Holman intervened, and alleged that she had previously purchased and paid for the merchandise, and was the actual owner and entitled to the possession of the same. The creditors of the mercantile company, through the sheriff, claimed that the sale of the goods to Holman was fraudulent as against them, and was made by the company without power or authority lawfully exercised, and therefore was invalid. The trial resulted in a verdict in favor of the purchaser, and is, in effect, a finding that the sale was made in good faith and for a sufficient consideration. The honesty of the transaction was decided by the jury, and is no longer open to question; but there is a contention that the mercantile company had no power to transfer property, and that, if it had, the power was not exercised in a legal and effective manner. The stock of goods, business, and good will, which constituted the

Northern Ry. Co., 50 Minn. 438, 52 N.W. 913.[1] Municipal corporations hold real property for public use and for public purposes in a greater sense than do railway companies hold their right of way. There is no reason whatever for determining that the former are subject to the operation of the statute, and at the same time hold that the latter are exempt from the operation of the same law. Such a conclusion would take front rank among the legal absurdities.

. . . No matter what rights the beneficiary of the grant may have to use and occupy, if it so chooses, its right of way over and through public domain to the full extent of 400 feet, it is obvious that it must take this right subject to the statute relating to adverse possession. No other conclusion can be tolerated. . . .[2]

SECTION IV.

Power to borrow Money. Power to issue Negotiable Notes.[3]

BRADBURY v. BOSTON CANOE CLUB.

1891. 153 *Massachusetts*, 77.

HOLMES, J. This is an action upon a promissory note for one hundred and fifty dollars and interest, given by the defendant to the plaintiff for money lent to it by the plaintiff to be used in building a club-house. There is a second count for money lent. At a meeting, duly called, the corporation passed a vote authorizing its treasurer to borrow money in terms sufficiently broad to cover the loan in question. The suggestion that no sufficient notice of the business to be transacted was given, does not seem to us fairly open on the agreed facts. Moreover, it would be impossible to argue that the defendant had not recognized and ratified the act of its treasurer in borrowing from the plaintiff.

[1] But see 1 Dillon, Mun. Corp. 4th ed. s. 675. — ED.

[2] In the same direction is *Midland R. Co.* v. *Wright*, L. R. (1901), 1 Chan. 738.

For a different view, see *Southern Pacific R. Co.* v. *Hyatt*, California, 1901, 64 Pacific Reporter, 272.

In *Sapp* v. *Northern Central R. Co.*, 1878, 51 Maryland, 115, it was *held*, that an easement of a footway by the side of a railroad track cannot be acquired by prescription. So in *Canadian Pacific R. Co.* v. *Guthrie*, Supreme Court of Canada, Feb. 19, 1901, it was *held*, that user of a way across (or under) a railway line "could never ripen into a title by prescription of the right of way." 37 Canada Law Journal, 272. — ED.

[3] Logically, a discussion of the question whether a corporation has power to incur any indebtedness at all should precede the discussion as to its power to incur indebtedness in the form of borrowing.

It is generally assumed that corporations are not bound to do a strictly cash business; but are impliedly authorized to incur debts, in the ordinary way of business, for objects within the scope of the corporate purposes as defined by the charter. See Green's Brice's Ultra Vires, 2d Am. ed. pp. 207, 208. And "a limitation upon the right of a corporation to borrow money does not necessarily restrict the right of the company to incur debts in the course of its usual business." 1 Morawetz, Corp. 2d ed. s. 344. — ED.

The money was received by the corporation, and was used by it for the purpose mentioned. The only question for us is, whether the corporation acted illegally in borrowing money for the purpose of erecting a club-house upon land of which it held a lease.

The defendant is a corporation formed under the Pub. Sts. c. 115, § 2, for encouraging athletic exercises. By § 7 it "may hold real and personal estate, and may hire, purchase, or erect suitable buildings for its accommodation, to an amount not exceeding five hundred thousand dollars," etc. We are of opinion that under these words the defendant had power to take a lease of land and to erect a suitable club-house upon it. Having this power, it was entitled to raise money for the purpose. No argument is needed to show that the power at the end of § 7, to receive and hold in trust funds received by gift or bequest, does not confine the corporations to that mode of raising it. Borrowing money is a usual and proper means of accomplishing what the statute expressly permits. See *Fay* v. *Noble*, 12 Cush. 1, 18; *Morville* v. *American Tract Society*, 123 Mass. 129, 136; *Davis* v. *Old Colony Railroad*, 131 Mass. 258, 271, 275. As this is a sufficient reason for giving the plaintiff judgment, it is unnecessary to consider whether there are not others. *Judgment for the plaintiff.*

C. J. McIntire & F. Hunt, for the plaintiff.

C. H. Sprague, for the defendant.

BATEMAN *v.* MID-WALES RAILWAY CO.
NATIONAL, &c., CO. *v.* SAME.
OVEREND, GURNEY, & CO. (LIMITED) *v.* SAME.[1]

1866. *Law Reports*, 1 *Common Pleas*, 499.

THESE were actions brought by the respective plaintiffs against the defendants, a railway company, incorporated under the 22 & 23 Vict. c. lxiii., the 5th section of which prescribed the limit of their capital (170,000*l.*), and the 7th and 9th the mode of raising it; the 37th and 38th impowered them to contract for working the traffic upon the railway, and the 1st section incorporated the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); but there was no provision in terms impowering them to draw, accept, or indorse bills of exchange or promissory notes.

The declaration in each case charged the company as the acceptors of several bills of exchange, drawn respectively by John Watson & Co.,

[1] Arguments omitted; also the concurring opinions of BYLES J., and KEATING J. — ED.

CHAPTER XX.

EFFECT OF ULTRA VIRES TRANSACTIONS.

[The expression *ultra vires* is used in different senses — to express either that the act of the directors or officers is in excess of their authority as agents of the corporation, or that the act of the majority of the stockholders is in violation of the rights of the minority, or that the act has not been done in conformity with requirements of the charter, or that the act is one that the corporation itself has not the capacity to do, as being in excess of its corporate powers.[1]

The indiscriminate use of this expression, with respect to cases different in their nature and principles has led to considerable confusion, if not misapprehension. Where the act done by directors or officers is simply beyond the powers of the executive department of the corporation as the agency by which the corporation exercises its functions, and not of the corporation itself, it may be made valid and binding by the action of the board of directors, or by the approval of the stockholders. Where the act done by stockholders is not in excess of the powers of the corporation itself, but is simply an infringement upon the rights of other stockholders, it may be made binding upon the latter by ratification or by consent implied from acquiescence. Where the infirmity of the act does not consist in a want of corporate power to do it, but in the disregard of formalities prescribed, it may or may not be valid as to third persons dealing *bonâ fide* with the corporation, according to the nature of the formality not observed, or the consequences the legislature has imposed upon non-observance. These are all cases depending upon legal principles, not peculiarly applicable to corporations, and the use of the phrase *ultra vires* tends to confusion and misapprehension. In its legitimate use, the expression *ultra vires* should be applied only to such acts as are beyond the powers of the corporation itself.]

Depue, J., in *Camden & Atlantic R. R. Co.* v. *Mays Landing, &c., R. R. Co.*, A. D. 1886, 48 New Jersey Law, 530, pp. 574, 575.

[1] The expression is also used to describe an act which is "illegal" for reasons other than the mere lack of legislative authority in the corporation to do the act; *i. e.*, where the act is forbidden by some statute or rule of law other than the general rule that corporations shall not exceed the authority granted them by the State. — Ed.

SECTION I.

Transaction within the apparent Authority of the Corporation, and rendered Ultra Vires only by Reason of the Purpose entertained by the Corporation, or by other extrinsic Facts.

MONUMENT NAT'L BANK *v.* GLOBE WORKS.

1869. 101 *Mass.* 57.

HOAR, J. The single question presented for our decision in this cause, all others which arise upon the report having been waived, is, whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any knowledge that the makers had not received the full consideration, cannot be enforced against them, because it was in fact made as an accommodation note.

The argument for the defendants takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation; and that, as any persons taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers, and were therefore bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute.

The court are all of opinion that this position is not tenable, and that the defence cannot be maintained.

It has long been settled in this Commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. *Narragansett Bank* v. *Atlantic Silk Co.* 3 Met. 282. And it was held in *Bird* v. *Daggett*, 97 Mass. 494, as a just corollary to that proposition, that such a note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The question was not discussed, nor the reasons for the decision fully stated, in *Bird* v. *Daggett;* but it was assumed that the doctrine announced was clear and undoubted law.

The doctrine of *ultra vires* has been carried much farther in England than the courts in this country have been disposed to extend it; but, with just limitations, the principle cannot be questioned, that the limitations to the authority, powers and liability of a corporation are to be

found in the act creating it. And it no doubt follows, as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers.

But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply. As was said by Selden, J., in *Bissell* v. *Michigan Southern & Northern Indiana Railroad Co.* 22 N. Y. 289, 290: "There are no doubt cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bonâ fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."

This doctrine seems to us sound and reasonable; and in conformity with it, it was held in *Farmers' & Mechanics' Bank* v. *Empire Stone Dressing Co.* 5 Bosw. 275, that an accommodation acceptance by an officer of a manufacturing corporation, on behalf of the company, was not binding, unless the consideration had been advanced upon the faith of the acceptance; but that if the consideration was paid in good faith after the acceptance, and upon the credit of it, it could be enforced.

So it was said by Lord St. Leonards that he felt a disposition "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation, and of the contract entered into." *Eastern Counties Railway Co.* v. *Hawkes*, 5 H. L. Cas. 331, 373.

The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid, or for the

most part those in which the other contracting party had notice upon the face of the transaction of the want of corporate power.

There can be no doubt that it is very often true that a corporation may be responsible for the unauthorized, and even for the unlawful acts of its agents, apparently clothed with its authority. No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable, in this Commonwealth, for one committed by its servants. Bills of a bank issued without consideration, and even stolen, are good in the hands of an innocent holder for value. Many other illustrations might be given, but enough has been said to show the principle on which our decision rests.

Judgment for the plaintiffs.

R. H. Dana, Jr., & T. K. Lothrop, for the defendants.

C. A. Welch & W. W. Warren, for the plaintiffs.

LONG *v.* GEORGIA PACIFIC R. CO.

1890. 91 *Alabama*, 519.[1]

McClellan, J. The case made by the amended bill is this: On April 23, 1883, the complainant, B. M. Long, and his wife, Amanda C. Long, executed to the Georgia Pacific Railway Co. a deed upon valuable consideration presently paid, to and of the iron, coal and oil interests and properties in and pertaining to certain tracts of land, aggregating about four thousand acres; the said Long retaining the fee to said lands, except in respect to said mineral interests, and continuing in possession thereof. The grantee is a corporation, and was and is without power to purchase and hold said land, or the mineral interests in the same. The bill seeks to have the deed declared void, because of this incapacity of the corporation, and to have the same cancelled as a cloud upon complainant's title. The bill was demurred to on several grounds, and the demurrer was sustained generally, the decree to that end being now assigned as error.

Only those grounds of error which present the question, whether a vendor who has sold, received payment for, and conveyed land to a corporation, which had no power to hold the same, can have any relief in respect to the transaction, are discussed in argument; and to these our consideration will be confined, since it is manifest that the determination of this question, in line with the decree below, as we think it must be determined, will be fatal, not only to the present appeal, but to complainant's cause of action.

It is thoroughly well settled law, that a party to an *ultra vires executory* contract made with a corporation is not estopped to set up the want of corporate capacity in the premises, either by the fact of contracting, whereby the power to contract is, in a sense, admitted or recognized, or by the fact that the fruits or issues of the contract have been received and enjoyed; and this, though the assault upon the transaction comes from the corporation itself. — *Marion Savings Bank v. Dunklin*, 54 Ala. 471; *Chambers v. Falkner*, 65 Ala. 448; *Sherwood v. Alvis*, 83 Ala. 115; *Chewacla Lime Works v. Dismukes*, 87 Ala. 344. But, where the contract is fully executed — where whatever was contracted to be done on either hand has been done — a different rule prevails. In such case, the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other. As declared by Mr. Bishop, "the parties voluntarily doing of what they have unlawfully agreed, places them, in effect, in the same position as if the contract had been originally good; neither can recover of the other

[1] Statement and arguments omitted. — Ed.

what was parted with. The reason for which is, that, since they are equally in fault, the law will help neither." — Bishop on Contracts, § 627.

The former decisions of this court are in line with this doctrine, and fully recognize the distinction between executory and executed void contracts, to the effect that, while suits to enforce the former may always be defended on the ground of their invalidity, no relief prayed upon such ground can be granted with respect to the latter. — *Morris v. Hale*, 41 Ala. 510; *Ingersoll v. Campbell*, 46 Ala. 282; *Sherwood v. Alvis*, 83 Ala. 115; *Dudley v. Collier*, 87 Ala. 431; *Craddock v. Mortgage Co.*, 88 Ala. 281. And this is the doctrine generally declared by other courts. — *Thomas v. Railroad Co.*, 101 U. S. 71; *Day v. S. B. Co.*, 57 Mich. 146; s. c., 52 Amer. Rep. 352; *Parish v. Wh* 22 N. Y. 494; *Miners' Ditch Co. v. Tellerbach*, 37 Cal. 542 *Terry v. Eagle Lock Co.*, 47 Conn. 141.

There is no question but that the case presented by the bill involved a contract on the part of the railway company to buy, and on the part of the complainant to sell, certain interests in the land described. It is equally clear that the payment of the agreed price on the one hand, and the execution of the conveyance on the other, fully executed this contract on both sides, left nothing to be done by either party in the premises, and bring the transaction within the principle we have been considering, which denies to the complainant any relief in respect to it.

The same conclusion is reached by another well established principle. It is, that when a party sells and conveys property to a corporation, which is without power to purchase and hold the same, and receives compensation therefor, there being no fraud in the transaction, he is in no sense injured or prejudiced by the incapacity of the corporation, nor can he be heard to complain of it; but the question becomes one between the corporation and the State, the sovereign alone having the right to impeach the transaction; and until it supervenes for this purpose, the corporation is vested with perfect title against all the world, defeasible only on office found. — *R. & B. Railroad Co. v. Proctor*, 29 Vt. 93; *Leazure v. Hillegas*, 7 Serg. & Rawle, 313; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Baird v. Bank of Washington*, 11 Serg. & Rawle, 411; *Lathrop v. Bank*, 8 Dana, 114, 129; *Hough v. Cook County Land Co.*, 73 Ill. 23; s. c., 24 Amer. Rep. 230; *Cowles v. Springs Co.*, 100 U. S. 55; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405, 413; 2 Mor. Corp. § 710.

The decree of the chancellor is affirmed; and the same result is reached in the case of B. L. Jones and B. B. Long v. Ga. Pac. Railway Co., submitted with this case, and involving the same question.

Affirmed.

JEMISON *v.* CITIZENS' SAVINGS BANK.

1890. 122 *New York*, 135.[1]

APPEAL from General Term of Supreme Court in First Judicial Department, affirming a judgment in favor of defendant.

Francis C. Barlow, for appellant.

Benjamin H. Bristow, and *William D. Guthrie*, for respondent.

HAIGHT, J. The plaintiffs were commission merchants and members of the Cotton Exchange of the city of New York. The defendant was a savings bank and trust corporation organized under the laws of Texas.

This action was brought to recover commissions, and for money claimed to have been expended for the defendant on the purchase and sale of cotton futures.

The defense was that the defendant, as a savings bank and trust corporation, had no power or authority to deal in the purchase and sale of cotton for future delivery, or in contracts for the purpose of speculation; that in the transaction alleged in the complaint it acted as the agent of one Albert P. Clopton, of Jefferson, Texas, and that the fact that he was the principal for whom the defendant acted was disclosed and well known to the plaintiffs prior to the time of the transaction referred to.

Whilst the fact distinctly appears from the correspondence between the parties that the defendant was acting for "good responsible customers," the General Term was of the opinion that this defense could not be sustained for the reason that the defendant did not disclose the name of its principal at the time of the giving of the orders complained of for the purchase and sale of cotton futures. Had this defense been sustained, the principal and not the defendant, his agent, would have been liable. Without stopping to consider the evidence we shall assume that this defense was not established, and proceed to consider the question as to whether the defendant was liable as principal.

Transactions between the parties commenced in January, 1879, by a letter from J. H. Parsons, as cashier of the defendant, asking the plaintiffs the amount of margin and commission they required for the purchase of cotton futures. The plaintiffs answered, giving the amount, and this was followed by an order by telegraph from Parsons, as cashier, under date of February tenth, to buy 100 bales, June delivery, and on the same day he wrote the plaintiffs that the order was made for one of their customers who had deposited $250, as per their favor of the twenty-seventh ult. Other orders followed, the final result of which was a loss, to recover which this action was brought. At the time Parsons was the cashier of the defendant, possessing the powers and duties incident to the office under the charter, constitution and by-laws, having the general charge of the business of the bank and the supervision of the

[1] Arguments and part of opinion omitted. — ED.

concern, and inasmuch as the answer alleges that the transactions referred to in the complaint were had between the plaintiffs and the defendant acting as agent, we shall treat him as possessing all of the authority to act in the premises that the directors of the defendant had the power to give. This brings us to the question whether or not the defendant had the power to make the orders in question.

. . . . . .

Whilst the buying and selling of cotton to be delivered in the future, may not ordinarily be immoral or prohibited by any statute, it is not included in the powers given to the defendant by its charter. The transaction in question was prejudicial to its stockholders and tended to endanger and destroy the safeguards provided for the depositors. The stockholders and depositors had the right to have their funds invested in accordance with the provisions of the charter and the Constitution and laws of the state, and in so far as this right was violated by the transaction in question it was a misappropriation of the funds and immoral.

It is contended that the defense of *ultra vires* is not available in this case, for the reason that the contract had been executed on the part of the plaintiffs and that the defendant is estopped from setting up the defense. In the case of *Whitney Arms Co.* v. *Barlow* (63 N. Y. 62) the plaintiff was a corporation organized for the purpose of manufacturing every variety of fire-arms and other implements of war, and all kinds of machinery adapted to the construction thereof. It entered into a contract with the American Seal Lock Company to manufacture and deliver 10,000 locks. The locks having been delivered, it was held that the contract was fully executed and that the plea of *ultra vires* would not prevail as a defense to an action brought to recover the contract price. We do not question the rule thus invoked. It has been repeatedly declared in other cases, as, for instance, in *Parish* v. *Wheeler* (22 N. Y. 494), in which it was held that a railroad company having purchased and received a steamboat could be compelled to pay for it, although the power to purchase such boat was not included in its charter. But this doctrine has no application to executory contracts which are sought to be made the foundation of an action, or to contracts that are prohibited as against public policy or immoral. (*Nassau Bank* v. *Jones*, *supra*; *P. C. & S. L. R. Co.* v. *K. & H. B. Co.* 131 U. S. 371–389.)

In the case at bar, the transaction as we have seen was not only immoral and in violation of the rights of the stockholders and depositors, but the defendant had received nothing by virtue of it. The cotton had been purchased by the plaintiffs in their own name, they taking title thereto and holding it upon the defendant's account. It was purchased under the rules of the Cotton Exchange of the city of New York in which the members doing business therein with other members act as principals and are liable as such. The most that can be claimed is that they held the cotton or the contracts therefor subject to the call or

order of the defendant. There had been no delivery of any cotton or property of any kind, or transfer of any title to such property to the defendant. If the steamboat had never been delivered to the railroad company so as to transfer the title thereto, or if the 10,000 locks had never been delivered to the American Seal Lock Company, very different questions would have been presented in the cases to which we have called attention. We consequently are of the opinion that under the circumstances of this case the defense of *ultra vires* is still available to the defendant.

The claim is made on behalf of the appellants that the defendant, in making the orders, acted as an agent for an undisclosed principal, and is, therefore, liable as such. If the defendant had no power to engage in the business as principal we do not understand what right it had to do so as an agent, but conceding that it was an agent and that the orders were made for and on behalf of Clopton then this action should have been brought against Clopton instead of the defendant. But it is claimed that the defendant neglected to disclose its principal at the time of making the orders and for that reason it is liable; but if it neglected to disclose its principal, so far as this action with the plaintiffs is concerned, it must be regarded as principal and liable as such, and if a principal then the question of *ultra vires* arises. The plaintiffs cannot sustain their action upon the two theories, for they lead in different directions. They cannot proceed upon the theory that the defendant was an agent, for the purpose of avoiding the question of *ultra vires*, and then upon the theory that the defendant was a principal, for the purpose of establishing a right to recover. Undoubtedly a person may in fact be an agent and still bind himself as a principal, but if he is proceeded against as a principal he is entitled to all of the rights and privileges that the law gives to a person occupying that position.

We consequently are of the opinion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

SECTION VII.

Suit by Corporation on an Ultra Vires Contract which has been fully performed on its part.

MARBLE CO. v. HARVEY.

1892. 92 *Tennessee*, 116.[1]

APPEAL from Chancery Court of Knox County. H. R. GIBSON, Ch.

Green & Shields for Marble Company.

W. C. Kain for Harvey.

LURTON, J. The complainant is an Ohio corporation, and was organized under the general incorporation law of that State "for the purpose of cutting, dressing, manufacturing, selling, and disposing of marble, stone, slate, granite, and other substances, with such other incidental and necessary powers essential to carry on said business." This company, with its place of business in Cincinnati, Ohio, has acquired the entire issue of shares made by a Tennessee incorporation, engaged in a similar business and under a similar charter, and known as the "McMillin Marble Company." Its last acquisition of shares was under a contract with the defendant, who was president of the Tennessee company, and who owned, at the time of the sale, twenty-five shares, being one half of the entire stock of the company. These shares he conveyed to a trustee, selected by the purchasing corporation, for its use and benefit. The consideration for the sale was the payment of six thousand dollars, the defendant assuming and agreeing to personally pay off and discharge one half of all liability which might be fixed upon the McMillin Marble Company as a result of certain suits against that company then pending in the Courts of this State.

The bill alleges, and the evidence establishes, that the complainant company has been compelled, in order to protect the property of the McMillin Marble Company, to pay out about the sum of three thousand dollars in settlement and satisfaction of the claims in suit at time of its contract with defendant.

The relief sought is a decree against defendant for one-half this sum, being the proportion he agreed to pay under his agreement of sale.

The defense is that the contract of sale to the complainant company was unlawful and void; that is to say, that the purchase of these shares was outside the objects of its creation as defined in its charter, and is therefore such a contract as is not only voidable, but wholly void and of no legal effect; that it is not a case of excessive use of a power granted, but that no power whatever was conferred to deal in or

[1] Part of opinion omitted. — ED.

hold the shares of another corporation; that the suit is one upon a void contract and in furtherance of it, and that it should not be entertained by a Court of law or equity.

[After discussing the question of *ultra vires* the opinion proceeds as follows:]

The result is, that this purchase of shares for the express object of controlling and managing another corporation was *ultra vires*, and, therefore, unlawful and void. Being void, it was of no legal effect, and no rights result from it enforceable by or through the Courts of the State, when such aid is invoked in furtherance of the unlawful agreement.

But it has been insisted very earnestly by the able and learned counsel for complainant, that where the contract has been fully executed by the plaintiff, the defendant should not be permitted to invoke such defense to a suit brought to compel performance; that to permit such a defense would work injustice, and enable defendant to repudiate his liability while holding on to the price he has received. There are cases where, the contract being fully executed on both sides, the Court, in the interest of justice, has refused to aid either in obtaining a rescission. *Whitney Arms Co.* v. *Barlow*, 63 N. Y., 62, is one of this class.

So there are cases where the defense of *ultra vires* has not been entertained when the defect was in the *mode* of executing the contract or in the *power of the agent.*

So there are many cases holding the party relying upon the defense of *ultra vires* to an accountability for the benefits received. Green's Brice's Ultra Vires, 717, and note at end of chapter.

Again, there are cases where the Courts have refused to entertain suits to recover property from corporations which is held in excess of charter capacity. In such cases the Courts have held that the defect in power could not be set up in a collateral way, and that the State only could complain of such violation. To this effect were our own cases of *Barrow* v. *Turnpike Co.*, 9 Hum., 303, and *Heiskell* v. *Chickasaw Lodge*, 87 Tenn. 668.

The question here is not like any of these. The complainant sues upon its contract, and, in affirmance of it, seeks to have the defendant perform an agreement which sprang from, and was collateral to it. It has received the shares it purchased, and holds on to them. It simply asks that the defendant be further compelled to perform his contract by contributing, in accordance with his agreement, his proportion of the liability paid off by complainant in protection of the property of the McMillin Marble Company. The suit is clearly in furtherance of the original, unlawful, and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it.

This proposition was very plainly put in *Pittsburg, etc.*, v. *R. & H. Bridge Co.*, where it was stated, as a result of all the previous de-

cisions of that Court upon this subject, "that a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into effect, become lawful and valid; but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received." 131 U. S., 389.

The case of *Central Transportation Co.* v. *Pullman Car Co.* [139 U. S. 24] is an exceedingly interesting case, as it involved a consideration of the circumstances under which a defendant may interpose the defense of *ultra vires*, notwithstanding full performance by the plaintiff.

In that case, the Central Transportation Company had leased and transferred all of its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum of $264,000 for a term of ninety-nine years. Possession was taken, and the installments paid for a number of years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained, the Court holding that the sale was unauthorized and in excess of the power of the selling company. It was urged for the plaintiff, as in this case, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period.

After reviewing its own decisions upon this branch of the case, that Court said:

"The view which this Court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense — that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature — is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been com-

plied with. But where the contract is beyond the powers conferred upon it by existing law, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by law.

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." 139 U. S., 60.

This seems to us to fully and clearly state the rule. The passage cited by counsel from *Railway Co.* v. *McCarthy*, 96 U. S., 267, "that the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice, or work a legal wrong," is misleading; and, if literally construed, would result in an enormous practical extension of the powers of corporations.

We do not understand that a result required by adherence to the law would be either unjust or a legal wrong. The learned Judge doubtless intended it to be understood that the defense would be a legal wrong only when the law did not require its consideration by the Court.

This passage and one of similar character in *San Antonio* v. *Mehaffy*, 96 U. S., 312, was uncalled for in the case in which it was used, and in *Central Transportation Co.* v. *Pullman Car Co.*, *supra*, was characterized as "a mere passing remark."

To sustain this suit, as now presented, would be in affirmance and furtherance of an unlawful and void contract. It is in no sense a suit in disaffirmance.

Whether complainant could tender back the shares received, and maintain a suit to recover the money paid for the shares upon an implied agreement to return money which the defendant had no right to retain, is a question not presented upon this record.

The decree dismissing the bill must, upon the grounds herein stated, be, and accordingly is, affirmed.

had gone beyond the powers which were entrusted to them, and by which their authority was limited under the articles of association, or whether that which had been agreed to had been duly performed. In no one of those cases was there any question as to whether the power of the whole company had been exceeded.

. . . . . .

Those cases have no application whatever to the present case. The present case stands upon the power, not of the directors alone, but of the whole company as settled by the Act of Parliament.

My Lords, for the reasons which I have thus endeavoured to express, I submit to your Lordships and move your Lordships that the judgment in the present case should be reversed, and judgment entered for the Defendants.

DAVIS *v.* OLD COLONY R. CO.
DAVIS *v.* SMITH AMER. ORGAN CO.

1881. 131 *Mass.* 258.[1]

GRAY, C. J. These actions are brought upon an agreement, signed by the Old Colony Railroad Company in the sum of $6000, and by the Smith American Organ Company in the sum of $5000, and by other corporations, partnerships and individuals in various sums, amounting in all to more than $200,000.

The agreement is in these words: "Boston, January 23, 1872. We the undersigned subscribers hereby agree, each with the other, that we will contribute towards any deficiency (should there be one) that may arise towards defraying the expenses of the World's Peace Jubilee and International Musical Festival, to be held in Boston, commencing on the 17th of June and closing on the 4th of July next, in such proportions as the amounts affixed to our several names bear to the whole amount subscribed: provided that no subscription shall be binding until the whole amount subscribed shall reach the sum of two hundred thousand dollars, and that no expenditure be incurred except under the authority of the executive committee, which committee shall represent the subscribers, and consist of ten or more persons, who may be chosen by the first six subscribers hereto."

At the trial of the first action, the plaintiffs offered to prove that the signature of each corporation was made by authority of its directors, with the reasonable belief that the holding of the festival proposed would be of great pecuniary benefit to the corporation by increasing its proper business, and that the signature would promote such holding;

[1] A large part of the opinion has been omitted. The omissions consist mostly of statements of reported cases and extracts from the opinions in such cases. — ED.

that the festival was held as mentioned in the agreement of guaranty; and that the reasonable expenditures therefor, made under authority of the plaintiffs, who relied upon that agreement in making them, exceeded the receipts by more than $200,000.

The only point argued and decided when one of these cases was before us upon demurrer to the declaration was, that the promise of the subscribers was to the executive committee therein mentioned, and that these plaintiffs as such committee were the proper parties to sue thereon. *Davis* v. *Smith American Organ Co.* 117 Mass. 456.

The principal question now presented by the answer, and which lies at the threshold of each case, is whether it was within the power of the defendant corporation to bind itself by such an agreement. Upon full consideration of the elaborate arguments of counsel upon that question, the court is of opinion that the agreement is *ultra vires*, and therefore, no action can be maintained upon it against either defendant.

The reported cases on the subject are so numerous, that we shall refer to comparatively few of them, except the principal cases in England and the decisions of the Supreme Court of the United States and of this court.

A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation.

Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this Commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the Secretary of the Commonwealth a certificate showing the purpose for which the corporation is constituted. Gen. Sts. *c.* 3, § 5. St. 1870, *c.* 224, §§ 7, 11. *Whittenton Mills* v. *Upton*, 10 Gray, 582, 598. *Richardson* v. *Sibley*, 11 Allen, 65, 72. *Pearce* v. *Madison & Indianapolis Railroad*, 21 How. 441, 443. *East Anglian Railways* v. *Eastern Counties Railway*, 11 C. B. 775, 811. *Ashbury Railway Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653.

There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie* v. *Cleveland, Columbus & Cincinnati Railroad*, 23 How. 381, 398, by Mr. Justice Hoar in *Monument Bank* v. *Globe*

Works, 101 Mass. 57, 58, and by Lord Chancellor Cairns and Lord Hatherley in *Ashbury Railway Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 668, 684, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party.

[After stating, and commenting upon, numerous cases, the opinion proceeds:]

Several of the cases most relied on by the plaintiffs were not suits against a corporation to compel it to pay money for a purpose not within the scope of its charter, but suits by a corporation to recover money or property, which, when recovered, would be held for the lawful uses of the corporation. *Chester Glass Co.* v. *Dewey*, 16 Mass. 94. *Old Colony Railroad* v. *Evans*, 6 Gray, 25. *National Pemberton Bank* v. *Porter*, 125 Mass. 333. *National Bank* v. *Matthews*, 98 U. S. 621.

[After stating, and commenting upon, these cases, the opinion proceeds:]

A corporation may indeed be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such a case, to maintain the action against the corporation is not to affirm, but to disaffirm, the illegal contract. *White* v. *Franklin Bank*, 22 Pick. 181. *Morville* v. *American Tract Society*, 123 Mass. 129, 137. *In re Cork & Youghal Railway*, L. R. 4 Ch. 748. But when the corporation has actually received nothing in money or property, it cannot be held liable upon an agreement to share in, or to guarantee the profits of, an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it. *East Anglian Railways* v. *Eastern Counties Railway*, *Macgregor* v. *Dover & Deal Railway*, *Ashbury Railway Carriage & Iron Co.* v. *Riche* and *Thomas* v. *Railway Co.*, above cited. *Downing* v. *Mt. Washington Road Co.* 40 N. H. 230. *Franklin Co.* v. *Lewiston Institution for Savings*, 68 Maine, 43.

The Old Colony Railroad Company is a railroad corporation, established by public statutes of the Commonwealth for the purpose of constructing and maintaining a railroad and carrying passengers and freight thereon. Sts. 1844, *c.* 150; 1854, *c.* 133; 1862, *c.* 149; 1872, *c.* 143. The holding of a "world's peace jubilee and international musical festival" is an enterprise wholly outside the objects for which a railroad corporation is established; and a contract to pay, or to guarantee the payment of, the expenses of such an enterprise, is neither a necessary nor an appropriate means of carrying on the business of

the railroad corporation, is an application of its funds to an object unauthorized and impliedly prohibited by its charter, and is beyond its corporate powers. Such a contract cannot be held to bind the corporation, by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in or to guarantee the success of any enterprise that might attract population or travel to any city or town upon or near its line. It follows that in the first of the actions before us there must be *Judgment for the defendant.*

The same reasons are no less applicable to manufacturing and trading corporations, established under general laws, and the purposes of which are required by those laws to be stated in their articles of association. The Smith American Organ Company was organized under the general act of 1870, *c.* 224, and the purposes of its incorporation are limited by its articles of association, as appearing in the certificate thereof filed in the office of the Secretary of the Commonwealth pursuant to that act, to "the manufacture and sale of reed organs and other musical instruments." The power to manufacture and sell goods of a particular description does not include the power to partake in, or to guarantee the profits of, an enterprise that may be expected to increase the use of or the demand for such goods. The case of *Ashbury Railway Carriage & Iron Co.* v. *Riche,* before cited, is directly in point.

This ground being decisive of the second action, it becomes unnecessary to consider the other objections to its maintenance, and the plaintiffs' exceptions must be *Overruled.*

M. F. Dickinson, Jr. & J. Fox, for the plaintiffs.

J. H. Benton, Jr., for the defendant in the first case.

R. D. Smith, (*C. Allen* with him,) for the other defendant.

DENVER FIRE INS. CO. *v.* McCLELLAND.

1885. 9 *Colorado,* 11.[1]

Action by McClelland (plaintiff below) against Insurance Company.

Plaintiff's complaint alleges that, on June 12, 1882, defendant company issued a policy insuring plaintiff's growing crops against loss or damage by hail; that this policy was issued in consideration of $3.00 cash paid by plaintiff, and also of a note for $58.03 executed and delivered by plaintiff to defendant; and that on June 19, 1882, plaintiff's crops were damaged by hail.

Defendants' answer set up, as second defence, that the defendant company's articles of incorporation were duly recorded in two public

[1] Statement abridged. Portions of opinions omitted. — Ed.

(2) *The Powers of the Majority.*

LORD GALWAY v. MATTHEW AND SMITHSON.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JULY 15, 1808.

[*Reported in* 1 *Campbell*, 403.]

THIS was an action against the defendants, as surviving partners of T. Whitsmith, on a promissory note, in the following form, made and signed by Matthew: —

"DECEMBER 16th, 1805.

"Sixty days after date, I pay Lord Viscount Galway, or order, £200, value received. For J. Matthew, T. Whitsmith, and T. Smithson. J. MATTHEW."

The Attorney-General contended that this note was binding only on Matthew, who signed it. He allowed the case would have been different had it been "we pay;" but the note in its present form was a mere personal undertaking by Matthew to pay a sum of money supposed to be due from himself and his co-partners.

Lord Ellenborough held, however, that a note made in this manner was sufficient on the face of it to bind the whole firm.[1]

[1] *Ex parte* Buckley, 14 M. & W. 469; De Gex, 153 s. c.; Norton *v.* Seymour, 3 C. B. 792; *Re* Warren, 2 Ware, 320; *Re* Thomas, 17 N. B. R. 54; 8 Biss. 139 s. c.; De Jarnette *v.* McQueen, 31 Ala. 230, 232; Filley *v.* Phelps, 18 Conn. 294; Kitner *v.* Whitlock, 88 Ill. 513 (*semble*); Maiden *v.* Webster, 30 Ind. 317; Nelson *v.* Neeley, 63 Ind. 194; Iddings *v.* Pierson, 100 Ind. 418; Carson *v.* Byers, 67 Iowa, 606; Mitchell *v.* D'Armond, 30 La. An. 396; *Ex parte* Nason, 70 Me. 363; Trowbridge *v.* Cushman, 24 Pick. 310; Agawam Bank *v.* Morris, 4 Cush. 99; Holden *v.* Bloxam, 35 Miss. 381; Richardson *v.* Huggins, 23 N. H. 106 (*semble*); Maynard *v.* Fellows, 43 N. H. 255; McGregor *v.* Cleveland, 5 Wend. 475; Turner *v.* Jaycox, 40 N. Y. 470; Crozier *v.* Kirker, 4 Tex. 252; Kendrick *v.* Tarbell, 27 Vt. 512, *accord*.

But see Crouch *v.* Emmerson, 3 Humph. 209.

PARTNERSHIP NOTES ARE JOINT, NOT JOINT AND SEVERAL. — A note reading, "I promise to pay," &c., signed by two or more persons, is regularly a joint and several note. March *v.* Ward, Peake, 130; Clark *v.* Blackstock, Holt, N. P. 474; George *v.* Tate, 102 U. S. 564, 569; Ely *v.* Clute, 19 Hun, 35. But if the parties to such a note are partners, and the note is given in behalf of the firm, the note (in the absence of a statute to the contrary), is joint only. *Ex parte* Buckley, 14 M. & W. 469; 1 Ph. 562; De Gex, 153 s. c. (overruling Hall *v.* Smith, 1 B. & C. 407); Crosby *v.* Jeroloman, 37 Ind. 273; Brown *v.* Fitch, 33 N. J. 418; Doty *v.* Bates, 11 Johns. 544. But see, *contra*, *Re* Bucyrus Co., 5 N. B. R. 303.

FIRM NAME REGARDED AS SIGNATURE OF ONE PERSON.

A joint and several note signed by a firm in the firm name, and also by a third person, is the note of two persons, namely, the firm and the other party. Accordingly, in a suit for contribution the other party will be liable to the extent of one half the

BOND v. GIBSON AND JEPHSON.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., FEBRUARY 15, 1808.

[*Reported in* 1 *Campbell*, 185.]

ASSUMPSIT for goods sold and delivered. It appeared that while the defendants were carrying on the trade of harness-makers together, Jephson bought of the plaintiff a great number of *bits* to be made up into bridles, which he carried away himself; but that instead of bringing them to the shop of himself and his copartner, he immediately pawned them to raise money for his own use.

Gazelee, for the defendant Gibson, contended that this could not be considered a partnership debt, as the goods had not been bought on the partnership account, and the credit appeared to have been given to Jephson only. He allowed the case would have been different, had the goods once been mixed with the partnership stock, or if proof had been given of former dealings upon credit between the plaintiff and the defendants.

LORD ELLENBOROUGH. Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purposes they may be applied. I will take it that Jephson here meant to cheat his copartner; still the seller is not on that account to suffer. He is innocent; and he had a right to suppose that this individual acted for the partnership.[1]

Garrow and *Lawes*, for the plaintiff.

Gazelee, for the defendants. *Verdict for the plaintiff.*

[1] The implied power of a partner in a trading partnership to buy goods for his firm is universally conceded. Gouthwaite *v.* Duckworth, 12 East, 421; Leiden *v.* Lawrence, 2 New Rep. 283; Noakes *v.* Barlow, 20 W. R. 388; Waring *v.* Grady, 49 Ala. 465; Dougal *v.* Cowles, 5 Day, 511, 515; Whiting *v.* Farrand, 1 Conn. 60; Bisel *v.* Hobbs, 6 Blackf. 479; Smith *v.* Smyth, 42 Iowa, 493; Stecker *v.* Smith, 46 Mich. 14; Braches *v.* Anderson, 14 Mo. 441; Wilson *v.* Elliott, 57 N. H. 316; Reynolds *v.* Cleveland, 4 Cow. 282; Mead *v.* Shepard, 54 Barb. 474; Baxter *v.* Clark, 4 Ired. 127; Strauss *v.* Jones, 37 Tex. 313; Griffith *v.* Buffum, 22 Vt. 181.

But the goods bought must be in the line of the firm business. Gullat *v.* Tucker, 2 Cranch C. C. 33; McNeill *v.* Reynolds, 9 Ala. 313; Porter *v.* Curry, 50 Ill. 319; Arick's Succession, 22 La. An. 501; Pinckney *v.* Keyler, 4 E. D. Sm. 469; Biggs *v.* Hubert, 14 S. Ca. N. S. 620; Ferguson *v.* Shepherd, 1 Sneed, 254; Bankhead *v.* Alloway, 6 Coldw. 56; Waller *v.* Keyes, 6 Vt. 257. Compare Cameron *v.* Blackman, 39 Mich. 108.

Power to buy Land. — A partner, as such, may buy land for the partnership, whenever it is needed for the firm business. Davis *v.* Cook, 14 Nev. 265, 282; Clay *v.* Carter, 16 W. N. (Pa.) 385 (April, 1885). Compare Judge *v.* Braswell, 13 Bush, 67 (a non-trading partnership).

The partnership is none the less liable, although the property purchased by the partner, ostensibly for the firm, has been misapplied by him. Carver *v.* Dows, 40 Ill. 374; Johnson *v.* Barry, 95 Ill. 483; Stecker *v.* Smith, 46 Mich. 14; Walden *v.* Sherburne, 15 Johns. 409, 422 (*semble*); Dickson *v.* Alexander, 7 Ired. 4; Kenney *v.* Altvater, 77 Pa. 34; Clark *v.* Johnson, 90 Pa. 442; Venable *v.* Levick, 2 Head, 351.

On the other hand, if goods are bought by a partner, actually and ostensibly as an individual, he alone is liable to the seller. Barton *v.* Hanson, 2 Taunt. 49; Hiard *v.* Biggs, Manning N. P. 220; Venables *v.* Wood (Court of Session) 1 D. 659, 3 Ross L. C. 529, s. c.; Elkin *v.* Green, 13 Bush, 612; Eastman *v.* Clark, 53 N. H. 276; Heckert *v.* Fegely, 6 Watts & S. 139.

Even though the partner afterwards apply the property for the benefit of his firm. Wilson *v.* Whitehead, 10 M. & W. 503; Guice *v.* Thornton, 76 Ala. 466; Smith *v.* Williams, 22 La. An. 268; Gates *v.* Watson, 54 Mo. 585; Webb *v.* Liggett, 6 Mo. Ap. 345; Sinkler *v.* Lambert, 5 Phila. 36; Holmes *v.* Burton, 9 Vt. 252.

Contra. Gardiner *v.* Childs, 8 C. & P. 345; Everitt *v.* Chapman, 6 Conn. 347; Sylvester *v.* Smith, 9 Mass. 119, 122 (*semble*); Poole *v.* Lewis, 75 N. Ca. 417.

Conversely, firm goods may be sold by the firm to a partner, and by him to third persons. In which case the partnership will have no claim against the third person. Ensign *v.* Wands, 1 Johns. Cas. 171.

A partner may, as such, bind the partnership by any simple contract, the making of which may fairly be said to fall within the scope of the firm business, e. g.: —

Contracts for Services. — Gleaden *v.* Tinkler, Holt N. P. 586; Beckham *v.* Drake, 9 M. & W. 79; Donaldson *v.* Williams, 1 Cr. & M. 345; Nolan *v.* Lovelock, 1 Montana, 224; Monroe *v.* Hamilton, 60 Ala. 226; Smith *v.* Cisson, 1 Col. 29; Barcroft *v.* Haworth, 29 Iowa, 462; Hyams *v.* Rogers, 24 La. An. 230; Burleigh *v.* White, 70 Me. 130; Sweeney *v.* Neely, 53 Mich. 421; Mead *v.* Shepard, 54 Barb. 474; Coons *v.* Renick, 11 Tex. 134; Noyes *v.* Cushman, 25 Vt. 390; Carley *v.* Jenkins, 46 Vt. 721.

Hiring Property. — Thomas *v.* Clarke, 2 Stark. 450; Sharpe *v.* Milligan, 22 Beav. 606 (but see Clements *v.* Norris, 8 Ch. Div. 129); Smith *v.* Cisson, 1 Col. 29; Stillman *v.* Harvey, 47 Conn. 26; Seaman *v.* Ascherman, 57 Wis. 547.

Contracts for Insurance. — Hooper *v.* Lusby, 4 Camp. 66; Peoria Co. *v.* Hall, 12 Mich. 202; Hillock *v.* Traders' Co., 54 Mich. 531; Osgood *v.* Glover, 7 Daly, 367.

Entering into an Account stated. — Fergusson *v.* Fyffe, 8 Cl. & F. 121; Cady *v.* Kyle, 47 Mo. 346; Gulick *v.* Gulick, 2 Green, 578.

Miscellaneous Transactions. — ——— *v.* Layfield, 1 Salk. 292, Holt, 434, s. c.; Bristow *v.* Taylor, 2 Stark. 50; Lacy *v.* McNeile, 4 D. & Ry. 7; Leiden *v.* Lawrence, 2 New Rep. (Ex.) 283; Alliance Bank *v.* Tucker, 15 W. R. 992; Weikersheim's Case, 8 Ch. 831; Morans *v.* Armstrong, A. M. & O. 25; Smith *v.* Hill, 13 Ark. 173; Kerr *v.* Sharp, 83 Ill. 199; First Bank *v.* Carpenter, 34 Iowa, 433, 41 Iowa, 518; Barker *v.* Mann, 5 Bush, 672; Lang *v.* Fiske, 11 Me. 385; Maltby *v.* N. W. Co., 16 Md. 422; Kennebec Co. *v.* Augusta Co., 6 Gray, 204; Brown *v.* Hartford Co., 117 Mass. 479; Harvey *v.* McAdams, 32 Mich. 472; Banner Co. *v.* Jenison, 48 Mich. 459; Bass *v.* Taylor, 34 Miss. 342; Pierce *v.* Jarnagin, 57 Miss. 107; Clark *v.* Rives, 33 Mo. 579; Bryant *v.* Hawkins, 47 Mo. 410; Ten *v.* Beyer, 38 N. Y. 161; Webster *v.* Rackett, 7 Hun, 229; Johnston *v.* Trask, 40 Hun, 415; Draper *v.* Moore, 2 Cincin. 167; Livingston *v.* Cox, 6 Barr, 360; Galloway *v.* Hughes, 1 Bail. 553; Gordon *v.* Buchanan, 5 Yerg. 71; Blair *v.* Johnston, 1 Head, 13; Lynch *v.* Flint, 56 Vt. 46 (*semble*); McBain *v.* Austin, 16 Wis. 87. — ED.

DUNCAN v. LOWNDES AND BATEMAN.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 20, 1813.

[*Reported in* 3 *Campbell*, 478.]

THIS was an action on a guarantee alleged to have been given by the defendants for the due payment of a bill of exchange to the plaintiff for £670 15*s*., accepted by Dickinson & Co., for the price of goods which the plaintiff had sold them.

It appeared that the two defendants carried on business together as merchants at Liverpool, and that this guarantee was signed by Lowndes in the partnership firm.

Garrow, A. G., for the defendants, insisted that the plaintiff was bound to give some direct evidence that Bateson had authorized Lowndes to enter into this undertaking.

Scarlett, contra, contended that this was to be inferred from the relation subsisting between them.

LORD ELLENBOROUGH. As it is not usual for merchants, in the common course of business, to give collateral engagements of this sort, I think you must prove that Lowndes had authority from Bateson to sign the partnership firm to the guarantee in question. It is not incidental to the general power of a partner to bind his co-partners by such an instrument.[1]

[1] Crawford *v.* Stirling, 4 Esp. 207; Hope *v.* Cust, 1 East, 53 (cited); Sandilands *v.* Marsh, 2 B. & Al. 673 (actual authority); Hasleham *v.* Young, 5 Q. B. 833; Brettel *v.* Williams, 4 Ex. 623 (overruling *Ex parte* Gardom, 15 Ves. 286); Moran *v.* Prather, 23 Wall. 492 (actual authority); Mayberry *v.* Bainton, 2 Harringt. 24; Marsh *v.* Thompson Bank, 2 Bradw. 217; Davis *v.* Blackwell, 5 Bradw. 32; Spurck *v.* Leonard, 9 Bradw. 174; Wagnon *v.* Clay, 1 A. K. Marsh. 257 (actual authority); Bloom *v.* Stern, 23 La. An. 747; Rollins *v.* Stevens, 31 Me. 454; Sweetser *v.* French, 2 Cush. 309; Butterfield *v.* Helmsley, 12 Gray, 226; Selden *v.* Bank of Commerce, 3 Minn. 166; Osborne *v.* Stone, 30 Minn. 25; Early *v.* Reed, 6 Hill, 12; Hamill *v.* Purvis, 2 Pen. & W. 177; Sutton *v.* Irwine, 12 S. & R. 13; McQuewans *v.* Hamlin, 35 Pa. 517; Shaaber *v.* Bushong, 105 Pa. 514; Avery *v.* Rowell, 59 Wis. 82, *accord*.

See, however, First Bank *v.* Carpenter, 34 Iowa, 433, 41 Iowa, 518.

As a partner, by indorsing a bill or note belonging to his firm, may make his firm liable upon the indorsement, so a partner who assigns a non-negotiable claim of his firm may in behalf of the firm guarantee its payment. Sweet *v.* Bradley, 24 Barb. 549. See also Jordan *v.* Miller, 75 Va. 442. The case of Hamill *v.* Purvis, 2 Pen. & W. 177, and the dictum in Selden *v.* Bank of Commerce, 3 Minn. 166, 179, to the contrary, seem to have been ill-considered.

Contracts beyond the scope of the Firm Business. — The following cases illustrate the limitation upon the power of a partner to bind his firm upon simple contracts: —

The plaintiff, however, was not prepared with any evidence to affect Bateson, and submitted to be nonsuited.[1]

Scarlett and *Littledale*, for the plaintiff.

Garrow, A. G., and *Park*, for the defendants.

WRIGHT AND OTHERS v. PULHAM.

IN THE KING'S BENCH, NOVEMBER 9, 1816.

[*Reported in* 2 *Chitty*, 121.]

TOPPING moved to set aside a verdict for the defendant in an action tried before LORD ELLENBOROUGH, C. J., at Guildhall.[2] The action was brought on a bill of exchange. The partnership was dissolved after the bill was dated, but before it was in fact drawn and accepted. One question was whether, after the dissolution, the other partners could be affected; and the other, whether the notice in the Gazette was sufficient against the plaintiff who, it did not appear, had had actual notice of the dissolution.

The Court held that the verdict was correct.[3] *Rule refused.*

Sharp *v.* Milligan, 22 Beav. 606 (*semble*); Clements *v.* Norris, 8 Ch. Div. 129; Walcott *v.* Canfield, 3 Conn. 194; Chandler *v.* Sherman, 16 Fla. 99; Buckingham *v.* Hanna, 20 Ind. 110 (actual authority); Graves *v.* Kellenberg, 51 Ind. 66; Love *v.* Payne, 73 Ind. 80; Brent *v.* Davis, 9 Md. 217; Marsh *v.* Gold, 2 Pick. 285 (actual authority); Lewis *v.* Westover, 29 Mich. 14; Goodman *v.* White, 25 Miss. 163; Toof *v.* Duncan, 45 Miss. 48; Davis *v.* Richardson, 45 Miss. 499; Pickels *v.* McPherson, 59 Miss. 216; Cayton *v.* Hardy, 27 Mo. 536; Tutt *v.* Cloney, 62 Mo. 116 (actual authority); Mercein *v.* Andrus, 10 Wend. 461; Cobb *v.* Shepard, 4 Alb. L. J. 14 (N. Y. C. A.); Comstock *v.* White, 31 Barb. 301; Thompson *v.* Franks, 37 Pa. 327; Roberts's Appeal, 92 Pa. 407; Livingston *v.* Pittsburgh Co., 2 Grant, 219 (actual authority); Nichols *v.* Hughes, 2 Bail. 109; Hutchins *v.* Turner, 8 Humph. 415 (see Hurd *v.* Haggerty, 24 Ill. 171, 176); Moreau *v.* Edwards, 2 Tenn. Ch. 347. — ED.

[1] A portion of the case is omitted. — ED.

[2] 1 Stark. 375, where it appears that the plaintiff had had no dealings with the firm prior to its dissolution.—ED.

[3] DISSOLUTION BY ACT OF THE PARTNERS. — The voluntary dissolution of a partnership terminates, in general, the power of a partner to bind the firm for any new engagements. But as each partner has been held out to the world as authorized to act for the firm, it is obviously inequitable that the firm should be exonerated from such engagements, unless due diligence has been exercised to apprise the public of the fact of dissolution. Accordingly a retired partner, who has failed to exercise this diligence, is estopped to deny his continued membership in the firm against a creditor who gave credit in the belief that he was still a partner.

That "equitable estoppel" is the true foundation for the liability of the retired

CARTER v. WHALLEY, SAUNDERS, VEYSEY, AND JACKSON.

IN THE KING'S BENCH, JUNE 15, 1830.

[*Reported in* 1 *Barnewall & Adolphus*, 11.]

ASSUMPSIT by the indorsee against the defendants as acceptors of a bill of exchange. Plea, by Whalley, the general issue; judgment by default against the other defendants. The bill, dated Birmingham, May 16, 1829, was drawn by Jackson upon "The Plas Madoc Colliery Company, near Ruabon, North Wales," payable to Jackson's order; accepted, per procuration, by Veysey for the Company, and indorsed by Jackson to the plaintiff. At the trial before Lord TENTERDEN, C. J., at the London sittings after Easter term, 1830, it was proved that Carter, a person residing at Birmingham, had discounted the bill for the Plas Madoc Colliery Company at the request of Jackson, who managed their pecuniary affairs, and who remitted the proceeds of the bill to them in Wales. The Company, some time before this transaction, consisted of the four defendants; but in April, 1829, Saunders withdrew from the partnership. It did not appear that any notice of this fact had been given to the public or to Carter. There was no proof of any dealing between Carter and the firm before May, 1829, when the bill was drawn. For a short time in 1828, the Company had an account at the Wrexham Bank in North Wales, and Saunders was known there as one of the partners. He had been seen at the colliery in April, 1828, taking some part in the getting up of a steam-engine. Jackson lived at Birmingham; and an attorney who witnessed the instrument by which Saunders made over his share in the partnership, and who knew all the defendants at that time, also resided there. The plaintiff had stated in December, 1829, that he did not know the defendant Whalley at the time when the bill was drawn. On this evidence Lord Tenterden was of opinion that the action was not sustained, Saunders having withdrawn from the firm before the acceptance was given; and that the plaintiff could not avail himself of the want of notice, as it did not appear that he had ever dealt with the Company while Saunders was a member, or

a partner cannot be more effective in terminating the power of a copartner to bind the firm, than a secret act of bankruptcy. In Whitman *v.* Leonard, 3 Pick. 177 (approved in Hicks *v.* Russell, 72 Ill. 230, 234), however, where the copartner gave a firm creditor a demand note in substitution for a time note, at the same time informing the creditor that the firm was in a bad way, the creditor was not permitted to charge the absconding partner upon the demand note, the Court saying: "Either no notice was necessary in such a case, or it is to be implied from the transaction." — ED.

that the partnership, during that time, had been so known at Birmingham, where the plaintiff carried on business, that he must be supposed to have looked upon Saunders as a partner, in default of notice to the contrary. The plaintiff was therefore nonsuited.

Campbell now moved for a rule to show cause why the nonsuit should not be set aside and a new trial had. The plaintiff was entitled to consider Saunders as one of the acceptors, having had no notice of his withdrawing from the firm. Evans *v.* Drummond [1] may appear an authority to the contrary; but that was the case of a *dormant* partner. Where the partner has been ostensibly such, and retires, there must be notice of that fact, to exempt him from future liability, Parkin *v.* Carruthers.[2] In that case the plaintiff was not proved to have had any dealing with the firm as at first constituted; and Le Blanc, J., laid it down as a clear rule of law that where there is a partnership of any number of persons, if any change is made in the partnership, and no notice is given, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties who first composed the firm. Here no notice whatever was given, though Saunders had been known as a partner during the continuance of the partnership.

Lord Tenterden, C. J., read over the evidence, and re-stated the opinion expressed by him at the trial.

Littledale, J. It was incumbent on the plaintiff in this action to prove a contract between the parties whom he named as acceptors and himself as indorsee. If they were all partners when the acceptance was given by Veysey, that contract is established. But it appears that they had ceased to be so, Saunders having withdrawn. Then it is said that the defendant ought to have proved some notice received by the plaintiff of this separation; and it is true that if the plaintiff at any previous time knew Saunders to be one of the partners, such notice ought to have been shown. Now, where all the names in a firm appear, it may be presumed that every one knows who the partners are; but where there is only a nominal firm, as in the present case, the fact of such knowledge must be ascertained by express proof. No proof of that kind appears here; and I therefore think that no contract was established between the plaintiff and Saunders.

Parke, J. The plaintiff was bound to show an acceptance by four parties; that is, that Veysey, who did accept the bill, was authorized to do so by the three others named in the declaration. Saunders had given no direct authority; he was not a partner at the time. But he may by his conduct have represented himself as one, and induced the

[1] 4 Esp. N. P. C. 89. [2] 3 Esp. N. P. C. 248.

plaintiff to give him credit as such, and so be liable to the plaintiff. Such would have been the case if he had done business with the plaintiff before as a member of a firm, or had so publicly appeared as a partner, as to satisfy a jury that the plaintiff must have believed him to be such; and if he had suffered the plaintiff to continue in and act upon that belief, by omitting to give notice of his having ceased to be a partner, after he really had ceased, he would be responsible for the consequences of his original representation, uncontradicted by a subsequent notice. But in order to render him liable on this ground, it is necessary that he should have been known as a member of the firm to the plaintiffs, either by direct transactions, or public notoriety. In the present instance that was not so. The name of the Company gave no information as to the parties composing it, and the plaintiff did not show that Saunders had dealt with him in the character of a partner, or had held himself out so publicly to be one as that the plaintiff must have known it. Carter, the plaintiff, lived at Birmingham; it should have appeared that there had been such a dealing at that place by Saunders, or that his connection with the Company had been so generally known there, that a knowledge of it by Carter must have been presumed. There having been no evidence for the jury on these points, I think the nonsuit was right.[1] *Rule refused.*

[1] A partnership from which B., who was not known to be a partner, has withdrawn, may have been carried on under the name of (1) "A.," the other partner, or (2) "A. & Co.," or (3) "The X Co."

In the first case it is agreed that B. cannot be charged upon any transaction subsequent to his withdrawal. Nussbaumer *v.* Beeker, 87 Ill. 281; Kelley *v.* Hurlburt, 5 Cow. 534; and cases generally, cited in this note.

In the second case B. is not chargeable, according to Evans *v.* Drummond, 4 Esp. 89; Heath *v.* Sansom, 4 B. & Ad. 172; Warren *v.* Ball, 37 Ill. 76; Magill *v.* Merrie, 5 B. Mon. 168 (*semble*); Grosvenor *v.* Lloyd, 1 Met. 19.

But see, *contra*, Edwards *v.* McFall, 5 La. An. 167; Goddard *v.* Pratt, 16 Pick. 412, 428 (*semble*); Deford *v.* Reynolds, 36 Pa. 325.

Nor in the third case, according to Carter *v.* Whalley, *supra*. But see, *contra*, Elkinton *v.* Booth, 143 Mass. 479; Shamburg *v.* Ruggles, 83 Pa. 148; Shamburg *v.* Abbott, 112 Pa. 6.

The general rule, as stated in the principal case, was affirmed in the following cases, where the firm style does not appear. Scott *v.* Colmesnil, 7 J. J. Marsh. 416, 423; Chamberlain *v.* Dow, 10 Mich. 319 (*semble*); Ayrault *v.* Chamberlin, 26 Barb. 83, 89 (*semble*); Vacaro *v.* Toof, 9 Heisk. 194. And in Farrar *v.* De Flinne, 1 Car. & K. 580; Western Bank *v.* Needell, 1 F. & F. 461; Park *v.* Wooten, 35 Ala. 242, — where the defendant was chargeable to the plaintiff because known by him, although not by the world at large, to have been a partner.

In Scotland, it seems, a retiring dormant partner continues liable, like an active partner, until due notice of his withdrawal is given. Hay *v.* Mair, 15 Fac. Col. 102, 3 Ross, L. C. 639, s. c. But see 1 Clark, Part. 315. — Ed.

CHAPTER XII.

POWER OF MAJORITY OF STOCKHOLDERS.[1]

DUDLEY v. KENTUCKY HIGH SCHOOL.

1873. 9 *Bush* (*Ky.*), 576.

Cradock & Trabue, for appellant.

Ira Julian, for appellee.[2]

LINDSAY, J. The order from which this appeal is prosecuted must be regarded as final. The special demurrer to the jurisdiction of the court was sustained, and a judgment rendered against appellant for the costs of the entire proceeding. This is equivalent to dismissing the petition for the want of jurisdiction in the court, and effectually precludes appellant from taking further steps in this litigation to obtain the relief desired.

We are inclined to differ with the circuit court as to its want of jurisdiction to enjoin the collection of so much of appellant's subscription to the high-school as had not been reduced to a judgment in the Franklin Quarterly Court; but this question need not be considered in view of the fact that we feel satisfied, after a careful examination of the petition, that it sets out no cause of action, and that under the facts as presented, and the provisions of the act of the General Assembly incorporating the high-school, it cannot be so amended as to present a cause of action.

The object of the corporation was to establish and maintain a high-school, and not to make money, and it has no legal right to engage in speculations or investments in real estate for the last named purpose; but it has the expressly delegated power "to receive and hold for the benefit of said high-school any lands, tenements, etc., . . . by gift, devise, donation, contract, or purchase." It is not complained that the house and lands purchased or about to be purchased from Gaines are not to be held for the benefit of the school, but that the corporation is unable to pay the contemplated price, and that the inevitable result of the purchase, if consummated, will be the bankruptcy of the corporation and the failure of the project to establish the school.

[1] This subject is also discussed in various cases which are given under special topics treated of in subsequent chapters; especially in the cases relating to the stockholder's right to maintain suit, the cases relating to the reserved power of the legislature to alter or amend charters, and the cases on *ultra vires*. — ED.

[2] Citations of counsel omitted. — ED.

It may be conceded that the facts stated in the petition fully authorize this conclusion, and yet it does not follow that a court of equity has the power at the suit of a stockholder to interfere by injunction to prevent the corporation from executing a contract it has the lawful right to make.

It is true that a majority of stockholders, no matter how great, have not the right to divert the funds of a joint-stock incorporated company to any other than the purposes for which it was organized; and if such funds are about to be so diverted, a stockholder may file a bill in equity against the company to restrain it by injunction from such diversion or misapplication. *Bagshaw* v. *Eastern Counties Railway Co.* (7 Hare, 114; 1 Beavan, 1); *Marsh* v. *Eastern Railway Co.* (40 N. H. 548). But relief will not be granted unless the corporation is about to do some act outside of the scope of its authority, or in disobedience to the provisions of its constitution, for so long as it exercises the powers granted by the charter the acts of the company must be treated by the courts as the acts of all the stockholders.

Each and every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation; and in cases involving no breach of trust, but only error or mistake of judgment upon the part of the directors who represent the company, individual stockholders have no right to appeal to the courts to dictate the line of policy to be pursued by the corporation. Angell and Ames on Corporations, sec. 393. Nor does the irregular manner in which the board of directors voted upon the proposition to make the purchase from Gaines authorize the chancellor to interpose to prevent its consummation. In the case of *Foss* v. *Harbottle* (2 Hare, 461), where the object of the bill in equity was to obtain relief against what was alleged to be a fraud committed by certain of the directors in an incorporated company, which fraud consisted in the sale to themselves, as representatives of the company, of lands in which they were individually interested, Vice-Chancellor Wigram held that although the act might be voidable by the company, yet, inasmuch as a majority of the proprietors might at a general meeting confirm it, he declined to interfere, saying, "While the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit." So in this case, while it may be that the corporation has the right to avoid the purchase from Gaines, because one of the directors, without whose vote the proposition would have been rejected, was allowed to vote by proxy, yet it may be that Dudley is the only stockholder who disapproves of the purchase, and it might result that, at the time the court was protecting him against the payment of his subscription because of the unauthorized action of the directors, a majority of the stockholders in general meeting might ratify or have already ratified the purchase, and bound

Dudley under his contract of subscription to submit to their will thus regularly and legally expressed.

It may be that the price agreed to be paid for the house and lands is greatly more than its value, but about this matter the opinion of the majority of the stockholders as expressed through the directory must control, and so far as the action of the court in this case is concerned it is immaterial whether the corporation acted wisely or unwisely in contracting a debt which possibly it will be unable to pay. The charter empowers it to make purchases of land, to contract debts, and to issue bonds to an amount not over two thirds of the stock subscribed; and if these powers are so exercised as to result in loss to the stockholders, it is a misfortune against which the courts can afford no protection.

Judgment affirmed.

NATUSCH *v.* IRVING ET ALS.

1824. *Gow on Partnership, Appendix No. VI. Page* 398.[1]

PLAINTIFF, on behalf of himself and all others the shareholders, members, or partners of the Alliance British and Foreign Life and Fire Assurance Company, filed this bill against the president and directors, praying, *inter alia*, for an injunction to restrain them from carrying on the business of marine insurance in the name or on the account of the company, and from applying the capital of the company to any such purpose.

The case made by the bill and affidavits was, in part, as follows:

A prospectus was issued for the formation of an unincorporated company to grant fire and life insurance, with a capital of five million pounds divided into fifty thousand shares, plaintiff subscribed for fifteen shares, paid the required deposit, insured his life in the company and paid the insurance premium. He was willing also to execute a proper deed of settlement. After the plaintiff had subscribed, &c., the majority of the company undertook to carry on the additional business of marine insurance. They prepared a deed of settlement which contained provisions for enabling the company to carry on marine insurance; and which plaintiff refused to execute. Plaintiff objected to the company's carrying on a marine insurance business. The directors informed plaintiff that, if he was dissatisfied with the course intended to be pursued, he might receive back his deposit with interest, and also have his life policy cancelled and the premium returned.

LORD ELDON, CHANCELLOR.

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[1] Statement abridged. Part of opinion omitted. The case was first reported in Gow, and has since been reported in 2 Cooper, *Tempore* Cottenham, 358. — ED.

3. An offer is made to the plaintiff that he may receive back his deposit with interest from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and, in effect, merely by *compelling* them to retire upon such terms, so to form a *new company*. This would, as to partnerships, be a most dangerous doctrine. Where a partnership is dissolved (even where it can be *in a sense* dissolved the instant after notice to dissolve is given, if there be no contract to the contrary), it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means and assets of the partnership existing at the time of the dissolution as beneficially as may be for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him, to whom they have given an offer of his deposit and interest, *Take that, and we are a new company*, keeping the effects, means, assets, and property of the old, as the property of the new partnership.

4. The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in.

5. A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the loss which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares.

. . . . . .

If six persons joined in a partnership of life assurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power; because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent.

But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, and clearly and distinctly brought this to the knowledge of one or more of the other partners, and such one or more of the other partners could be clearly shown to have

acquiesced in such intention, and to have permitted the other partners to have entered upon and to have engaged themselves and the body in such new projects, and thereby to have placed their partners, so engaged, in difficulties and embarrassments, unless they were permitted to proceed in the farther execution of such projects, if a court of equity would not go the length of holding that such conduct was consent, it would scarcely think parties so conducting themselves entitled to the *festinum remedium* of injunction.

It may be taken that the principle that would apply to the partnership of six, will apply to this partnership of 600 or 700; 340 have executed in respect of not quite half the number of shares: there probably may be therefore 600 or 700 members. To those who have not had occasion to observe the boldness of speculation, it may seem astonishing that persons, and so many in number, should have engaged themselves in a speculation so little explained, and undertaken to execute deeds, of the contents of which they had so little information. To those who know the difficulty of applying the rules of law and equity to societies constituted of such numbers of persons not incorporated, it is not matter of surprise that persons, ignorant of those difficulties, should become members of such societies; it may be matter of surprise to them that persons who know the difficulty of applying those rules should become members, even where the nature of the speculation is clearly explained, and full information is given of the contents of the deeds to be executed. Much has been done with respect to the difficulty alluded to, by provisions how those who have demands upon such societies are to sue, and how such societies are to be sued; much remains to be done, and particularly as to rendering simple and effectual the remedies of the members of such societies against each other. It is observed that the members of this society *underwriting* will be each liable to the bankrupt laws. That depends upon the act of parliament which is to take effect in *May* next.[1] Shares may devolve to feme coverts, infants, &c.; but whatever are the difficulties, courts must struggle to remedy them, and to prevent particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, empowered, or acquiesced in expressly or tacitly, so as to make it not equitable that they should seek to restrain them. The principles which a court would act upon in the case of a partnership of six must, as far as the nature of things will admit, be applied to a partnership of 600.

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The injunction was granted.

[1] 5 Geo. 4, c. 98, s. 2, by which an underwriter is declared to be a trader liable to the bankrupt laws, and see 6 Geo. 4, c. 16, s. 2. Formerly it was held that an underwriter, merely in that character, could not be a bankrupt. *Ex parte* Bell, 15 Vesey, 355.

HARTFORD AND N. H. R. CO. *v.* CROSWELL.

1843. 5 *Hill* (*N. Y.*), 383.

ASSUMPSIT, tried at the New-York circuit in March, 1841, before GRIDLEY, C. Judge. The action was brought to recover certain instalments upon the defendant's subscription to the capital stock of the plaintiffs' company. On the trial the case was this: In May, 1833, the legislature of Connecticut passed an act authorizing the plaintiffs to construct a rail-road from the town of Hartford to the city of New-Haven. The capital stock was divided into shares of $100 each, and the defendant subscribed for and was allowed 10 shares. The subscription was in these words: "Whereas the general assembly of the state of Connecticut, at their session in May, 1833, passed a resolution incorporating the Hartford and New-Haven Rail-Road Company, with power to construct a rail-road or way from the town of Hartford to the city of New-Haven: We do hereby subscribe to the stock of said company the number of shares annexed to our names respectively, on the terms, conditions and limitations mentioned in said resolution. New-York, July 31, 1835." In May, 1839, the legislature of Connecticut amended the act of incorporation by authorizing the company to "procure, charter or purchase and hold" such number of steamboats, to be used in connection with their road, as they might deem expedient, to an amount not exceeding $200,000; and, for that purpose, to increase their capital stock to the same amount. On the 2d of July following, the board of directors resolved to accept the amendment, and to adopt it as a part of the charter. They also resolved that the stockholders who were paying up their instalments should be allowed a preference in the distribution of the new stock to be created in pursuance of the amendment. In September, 1839, at a general meeting of the stockholders, the resolution to accept the amendment was ratified. Due notice of this meeting was given; but the defendant was not present, nor did it appear that he had at any time signified his assent to an acceptance of the amendment. Intermediate the date of the defendant's subscription and the amendment of the charter, the instalments sought to be recovered were regularly called for by public notice to that effect, and a personal demand thereof was shown to have been made of the defendant, who refused to pay. The road was completed and put in operation before the commencement of the suit. Upon these facts a verdict was rendered for the plaintiffs by consent, subject to the opinion of the court upon a case.

S. P. Staples, for the plaintiffs.

C. Mc Vean, for the defendant.

By the Court, NELSON, Ch. J. The main objection taken to a recovery in this case is, that the plaintiffs are seeking to enforce the performance of a different contract from that into which the defendant

entered when he subscribed for the stock; in other words, that the defendant never assented to the contract upon which the action is founded.

The original charter conferred upon the company all the usual and necessary powers for locating and constructing a railroad from the town of Hartford to the city of New-Haven. The ten shares subscribed for by the defendant were expressly taken upon "*the terms, conditions and limitations*" *mentioned in the charter.* And such would doubtless have been the legal effect of the subscription had no reference to the charter been made in it. The contract thus entered into was as specific and definite as the charter of the company could make it; and the meaning and intent of the parties cannot therefore be mistaken. It was a contract to take stock in an association incorporated for a particular object, having such limited and well defined powers as were necessary to the accomplishment of that object. The defendant assented to the object by his subscription, and thereby agreed that his interest should be subject to the direction and control of the powers thus expressly conferred, but nothing more.

Since entering into this contract, the plaintiffs have procured an amendment of their charter, by which they have superadded to their original undertaking, a new and very different enterprise — and, for aught that can be known, a very hazardous one — with the necessary additional powers to carry it into effect. Instead of confining their operations to the construction and management of their rail-road between Hartford and New-Haven, they have undertaken to establish and maintain a line of water communication by means of steamboats, at an expense not to exceed $200,000; to all which, it is insisted, the contract of the defendant has become subject, without his approbation or assent.

It is most obvious, if incorporated companies can succeed in establishing this sort of absolute control over the original contract entered into with them by the several corporators, there is no limit to which it may not be carried short of that which defines the boundary of legislative authority. The proposition is too monstrous to be entertained for a moment. Corporations possess no such power. Indeed they can exercise no powers over the corporators beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent. This is so in the case of private associations, where the articles entered into and subscribed by the members are regarded as the fundamental law or constitution of the society, which can only be changed by the unanimous voice of the stockholders. (*Livingston* v. *Lynch*, 4 *John. Ch. Rep.* 573; *Coll. On Part.* 641.) So here, the original charter is the fundamental law of the association — the constitution which prescribes limits to the directors, officers and agents of the company not only, but to the action of the corporate body itself — and no radical change or alteration can be made or allowed, by which new and additional objects are to be accomplished

or responsibilities incurred by the company, so as to bind the individuals composing it, without their assent.

The question has been the subject of consideration in Massachusetts and Pennsylvania, and in each the courts have not hesitated to maintain the inviolability of the contract as originally entered into, denying to the company the power of altering it essentially and of binding the subscribers who have not given their assent. In the case of *The Middlesex Turnpike Corporation* v. *Locke*, (8 *Mass. Rep.* 268,) the suit was brought upon a subscription contract for stock, by which the defendant agreed to take one share and to pay all assessments made upon it. The ground of defence which prevailed was, that the location of the turnpike road had been changed by an act of the legislature; after the defendant's subscription, the act having been passed at the instance of the corporation; and that the defendant had never assented to the alteration. The court said: "The plaintiffs rely on an express contract, and were bound to prove it as they allege it. Here the proof is of an engagement to pay assessments for making a turnpike in a certain specified direction. The defendant may truly say, *non hæc in fœdera veni.* He was not bound by the application of the directors to the legislature for the alteration of the course of the road, nor by the consent of the corporation thereto." The same principle was recognized and admitted in the case of *The Indiana & Ebensburgh Turnpike Co.* v. *Phillips*, (2 *Penn. Rep.* 184.)

I do not deny that alterations may be made in the charter by the procurement of the company, without changing the contract so essentially as to absolve the subscriber. Such would be the case, perhaps, in respect to mere formal amendments, or those which are clearly enough beneficial, or at least not prejudicial to his interests. A modification of the grant may frequently be advisable, if not necessary, in order to facilitate the execution of the very object for which the company was originally established; and I admit there are intrinsic difficulties in the way of laying down any general rules by which to distinguish between the two kinds of cases. Each must depend upon its own circumstances, and be disposed of with due regard to the inviolability belonging to all private contracts.

Some of the cases which have occurred exemplify the difficulties attending the question. In *Irvin* v. *The Turnpike Co.*, (2 *Penn. Rep.* 466,) it was held that a benefit which results to individual property by the location of the road, did not, in contemplation of law, enter into the consideration of the contract of subscription. Hence, it was there decided that the subscriber was bound, notwithstanding a change in the location of the road made by an act of the legislature against his remonstrance; and this though the change was obviously to his prejudice in point of fact. The decision, it will be perceived, is contrary to the case before referred to in Massachusetts. The court, moreover, were not unanimous, Rogers and Kennedy, Js. having dissented. In *Gray* v. *The Monongahela Navigation Co.*, (2 *Watts & Serg.* 156,)

wrong doer. In the case at bar the corporation had no power to build the extension under their original charter; and the act of 1850 is not binding upon the orator without his consent.

The injunction must therefore be allowed, but only so far as to restrain the defendants until the further order of the chancellor from applying the present funds of the corporation, or their income from the present road, either directly or indirectly to the purpose of building said extension in said road, or to pay land damages and other expenses which may be contingent upon the building of it; and also from using or pledging, directly or indirectly, the credit of the corporation in effecting the object of the extension; and at the same time the company will be left at liberty to build the extension with any new funds which they may see fit to obtain for that specific object.

Though this is but an interlocutory decree, made upon the plaintiff's equitable rights as disclosed in the bill, still it having been twice argued, and it being a case of considerable interest and importance, I have deemed it proper to publish, somewhat at length, the grounds of my opinion. "To err is human;" and if, upon more mature consideration, the conclusion of my own mind shall be found to be unsound, and not in accordance with principle and authority, I rejoice that they may be corrected by a superior tribunal.[1]

After the above decision was announced, and before the injunction was issued, the defendants proposed to file bonds to indemnify the plaintiff against all damages which he might sustain by reason of the extension; upon which the chancellor suggested, that he did not deem it competent for him to make contracts for the parties; and that upon the authority of the case of *Natusch* v. *Irving et al.*, it could make no difference, if filed, in the result.[2]

[1] The case was not carried to a higher court. — ED.

[2] In *Forrester* v. *Boston & Montana, &c. Co.*, A. D. 1898, 21 Montana, 544, the minority stockholders of a Montana corporation sought to enjoin the ratification of a transfer of the entire corporate property to a foreign corporation, in consideration of the latter corporation delivering its entire stock to the former corporation and assuming all its liabilities. By the agreement of transfer, the stockholders in the Montana corporation, who did not choose to accept shares in the foreign corporation in exchange for their present shares, were entitled to receive from the foreign corporation $170 for each share not exchanged.

Upon the hearing of the order to show cause why an injunction *pendente lite* should not issue, the defendants offered a bond in the penal sum of $50,000, conditioned, in substance, that if the defendants shall, when requested by plaintiffs, purchase from them the 200 shares owned by plaintiffs at the market price thereof and pay any damages that might be sustained by them because of any action that might be taken at the meeting of the stockholders called to ratify the transfer, the obligation should be void, but otherwise to be in force. The defendants further offered to execute a bond in such form, or with such conditions, in such amount, and with such sureties, as the court might designate, in lieu of the bond so offered, if it were deemed in any wise insufficient. The District Court declined to accept such bond, and granted the injunction order. The defendants appealed from the order granting the injunction. The opinion on this branch of the case was as follows:

PIGOTT, J., pp. 551, 552. "The court did not err in refusing to accept the bond or undertaking tendered by defendants. See Cook, Stock & S. § 502; *Stevens* v. *Railroad Co.*, 29 Vt. 545; *Railroad Co.* v. *Collins*, 40 Ga. 582; *Tomkinson* v. *Railway Co.*, 35 Ch. Div. 675; Thomp. Corp. § 345. Section 876 of the Code of Civil Procedure confers upon the court a discretionary power to vacate an injunction granted *ad interim* or *pendente lite*, where the alleged wrong or injury is reparable and capable of being adequately compen-

PHILLIPS *v.* PROVIDENCE STEAM ENGINE CO.

1899. 21 *Rhode Island*, 302.

BILL IN EQUITY to restrain a sale of the property of a corporation, ordered by a vote of the majority of the stockholders, brought by a minority stockholder. The facts are stated in the opinion. Heard on bill, answer, and replication. Bill dismissed.

STINESS, J. The complainant, a stockholder, seeks to restrain the respondent corporation from disposing of its property. The company is doing business under an extension by its creditors, in the terms of which an installment becomes due in November next. It is agreed that this cannot be met, and that the company will be unable to go on in business because the creditors refuse a further extension. In view of these facts, an arrangement has been made to form a new company, in which creditors holding extension notes will take preferred stock to the extent of one-half of their claims, while other subscribers will furnish enough cash to pay for the plant and provide a working capital. The terms of the proposed sale give to the present stockholders $70,000 over and above the indebtedness of the company, amounting to about $228,000, making a total payment of about $298,000. The estimates of the value of the property vary from $327,000 to $397,000, the latter being the complainant's estimate; but it does not appear that either party has reason to expect that either sum would be realized at a forced sale. This is not a sale in which the other stockholders are to gain any advantage beyond the privilege, which is also offered to the complainant, of taking his proportionate amount of cash or its equivalent stock in the new company, as he may prefer.

It is in effect a cash sale to strangers, approved by stockholders representing 3,675 shares against 75 held by the complainant. While this majority cannot affect any rights to which he is entitled, it tends to show a fair price. It is a well-known result, to which courts of justice cannot be blind, that large plants of this kind are often, if not

sated for in money, upon defendant's executing such an undertaking as the court may require. We do not think the court abused its discretion. As counsel well say, if plaintiffs were clearly entitled to an injunction in this case, the district court would not have been justified in accepting an undertaking in lieu of the injunction, which would be licensing the commission of a wrong not susceptible to compensatory damages. Although the present value of the shares held by plaintiffs may be accurately determined by a judgment, and the profits by way of future dividends on their shares that might accrue from the Montana Company predicted with approach to reasonable certainty, yet, if the transfer and the vote of the shareholders in attempted ratification thereof be *ultra vires* as to them, then it is manifest, upon the plainest principles of law, that no court may rightly compel them to dispose of their shares in *invito*. *Tomkinson* v. *Railway Co.*, *supra*, Beach. Inj. §§ 295, 296; *Mills* v. *Railway Co.*, *supra*. If, as matter of law, the proposed transfer was shown to be *ultra vires* the corporation, plaintiffs were entitled, as of right, to the injunction; and in such event, were a bond accepted and injunction refused, the fact would seem apparent that the court had decided that plaintiffs' property could not be taken without their consent, and at the same time had permitted it to be done, — an inconsistency needing no comment." — ED.

usually, sold at a great sacrifice in case of a forced sale. We should not have to go outside of the records of our own court to find proof of this fact. A sale being necessary, the question is how shall it be made. The prayer of the bill is that a receiver may be appointed; that the business may be wound up and the company dissolved; and the argument is that the sale of the effects should be at public auction.

The question, then, is whether the complainant is entitled to such a decree.

There is a difference of opinion as to the power of a corporation to sell its entire property and thus practically to retire from business. Some courts hold that it may be done by the consent of all the stockholders (Am. & Eng. Ency. L. 2 ed. vol. 7, p. 734, note 1), and others hold that it may be done by a majority. *Ditto*, notes 2, 3, and 4. All of the authorities cited in note 1, however, do not hold that the consent of all the stockholders is necessary, *e. g. Treadwell* v. *Salisbury*, 7 Gray, 393; *Wilson* v. *Miers*, 100 Eng. Com. Law, 248, *et al.* But the editor adds: "There seems to be no doubt that it may do so when it is no longer able to profitably continue its business."

We think that this is the correct rule. It has been recognized in this State. *Hodges* v. *N. E. Screw Co.*, 1 R. I. 312, 350. In *Wilson* v. *Prop'rs Central Bridge*, 9 R. I. 590, Brayton, C. J., said: "No case has been cited, and, in view of the diligence of counsel in this case, we may say there is no case which holds that where the purpose of the incorporation could not be accomplished, the business contemplated could not be carried on; where the capital had been exhausted in endeavors to go on, having no means to go further; a company thus laboring under burdens which they could no longer bear, could not release themselves by a surrender of their franchise to the State which granted and which was willing to receive it, and that by a majority. This is not only for their benefit, but it is a necessity, and it would be hard indeed if one stockholder could by his dissent prevent such relief against the prayer of all other members of the company." In *Peabody* v. *Westerly Water Works*, 20 R. I. 176, a necessary limitation to this rule was recognized in the words: "The action of the company was taken by a vote of more than 1,100 out of a total of 1,350 shares. There is no proof of unfairness, oppression, or fraud in such action. The case as presented is simply that of a stockholder who differs from a large majority of his fellow stockholders as to the expediency of a sale."

The principle upon which these cases rest is that a corporation may dispose of its property by a majority vote, in cases which are free from unfairness, oppression, and fraud. Against wrongs of this kind equity will interfere. To this effect are *Lauman* v. *Lebanon R. R.*, 30 Pa. St. 42; *Treadwell* v. *Salisbury*, 7 Gray, 393; *Leathers* v. *Janney*, 41 La. Ann. 1120; *Sewell* v. *East Cape May Co.*, 50 N. J. Eq. 717; *Sargent* v. *Webster*, 13 Met. 497; *Warfield* v. *Marshall*, 72 Ia. 666; *Wilson* v. *Miers*, 100 Eng. Com. Law, 348; see also *Miner's Ditch Co.* v. *Zellerbach*, 37 Cal. 543.

The complainant does not charge improper conduct, but simply that he considers the price inadequate and unjust; and hence he prays for a receiver and a sale of the property by auction. Ordinarily when a court orders a sale it can only be done by auction. A court cannot negotiate a private sale, and it orders an auction as the fairest chance for all parties to bid and buy. But when the parties in interest have negotiated a sale which is fair to all concerned, and there is nothing to show that a larger price may reasonably be expected, it does not follow that an auction sale would be ordered. This question was considered in *Quidnick Co.* v. *Chafee*, 13 R. I. 402, in which the trustee had an offer for the entire property, approved by nearly all the creditors. Then other parties intervened, agreeing to bid the amount named at auction, and the court ordered a sale by auction. In the present case there is no evidence that anybody is willing to give as much as the offer proposed, or that there is any reason to suppose that it will bring as much or more. The only testimony put in by the complainant is that the tools will probably bring more than they are valued at by the company, while as to the bulk of the property, the real estate, &c., there is no evidence of market value. Moreover, the complainant does not show that he desires to bid upon the property himself, or that he knows of any one who would bid at a sale. In this absence of evidence that a larger total might be expected from an auction sale we see no reason to disturb the agreement already made, which, upon the testimony given, seems to be fair.

The complainant relies strongly on *Mason* v. *Pewabic Co.*, 133 U. S. 50. In that case the court had appointed a master to value the property, which he reported to be nearly $500,000. A majority of the company had arranged a sale to themselves at $50,000. Naturally, in view of such gross inadequacy, the court ordered a sale by auction. The case was very different in its details from the case before us.

In *Wilson* v. *Prop'rs Central Bridge*, 9 R. I. 590, the city of Providence had control of the corporation and had sold the corporate property to itself. The court restrained the city from taking possession and ordered a sale by auction. That, too, was a different case from this one.

The court is bound to look to the interests of all parties, and especially to protect the rights of a minority from oppression and fraud. But where, as in this case, no such thing is charged, and nothing is shown to lead to the belief of a better total price, the complainant makes no case for interference. To show that movable tools may be sold at a price somewhat, but not largely, higher than that at which they are scheduled, is quite a different thing from showing that the plant as a whole would sell for more than the price offered. To set aside the sale under these circumstances would be to risk a certainty for an uncertainty, without any testimony on which to base a hope of benefit to the stockholders from such interference. We see no reason for such a step in the dark.

Bill dismissed.

ELYTON LAND CO. *v.* DOWDELL.

1896. 113 *Alabama*, 177.[1]

BILL in equity filed by Annie Dowdell, the owner of five shares in the Elyton Land Company, for the purpose of annulling a conveyance of its property by that corporation to the Elyton Company, and also of annulling a mortgage executed by the latter company to secure certain bonds.

Some years before the conveyance the Elyton Land Company having on hand, as profits, a large amount of notes, had issued dividend certificates to the amount of $1200 per share. These certificates had subsequently been paid for in bonds of the company, denominated "Dividend Trust Bonds." The plaintiff had disposed of her bonds. Her rights as a bondholder are not involved in this litigation, but only her rights as a shareholder.

The Elyton Land Company, under its charter and amendments, was authorized to buy land and sell lots; to borrow and lend money; to guaranty indebtedness; to build, rent, lease, and use buildings; to issue bonds in amount not to exceed five millions of dollars; and to take stock in other corporations.

In 1893, the Elyton Company was incorporated, with authority to engage in many enterprises not included in the original or amended charter of the Elyton Land Co. The fourth section of the act incorporating the Elyton Co. enacts, "that said corporation may purchase the property, real, personal, and mixed, of the Elyton Land Company: provided that such sale is made under the laws now in force, and nothing in this act shall be construed to impair or in any manner whatsoever to affect the rights of any stockholder of the Elyton Land Company." . . .

At a regular meeting of the stockholders of the Elyton Land Company, a majority of the stockholders voted to sell its entire assets to the Elyton Company. The terms of the sale were, that the Elyton Company should pay all the liabilities of the Elyton Land Company; and issue $2,500,000 bonds, $1,796,000 of which were to be issued to the holders of the dividend trust bonds in payment thereof; and in addition issue 10 shares of its stock to each holder of 1 share of stock in the Elyton Land Co. Thereupon the Elyton Land Company transferred all its property to the Elyton Company. The latter issued the bonds provided for, and executed a mortgage to secure them. The stipulated amount of stock was also issued, and was delivered to such of the stockholders as were willing to receive it in exchange for the stock held by them in the Elyton Land Company. No other arrangement or provision was made to pay the stockholder in the Elyton Land Company for his share, except to accept the stock in the Elyton

[1] Statement abridged. Arguments omitted.—ED.

Company. It is alleged in the bill, and not traversed in the plea, that complainant was not present, was not represented, and had no notice of the meeting of the directors of the Elyton Land Company at which it was resolved to sell its property to the Elyton Company. Immediately after the consummation of the transaction between the two corporations, complainant filed her bill.

To the bill, the respondent filed a plea and answer in support of the plea. The plea set forth the history of the "Dividend Trust Bonds;" alleged that they were valid obligations of the Elyton Land Company; and that the plaintiff, having accepted her proportion of the bonds with full knowledge of the facts, is estopped to deny that they are binding obligations of the Elyton Land Company.

The court ruled that the plea was insufficient as a defense to the bill. Appeal.

Alex. T. London, and *Tompkins & Troy*, for appellants.

Gordon Macdonald and *Smith & Weatherley, contra.*

COLEMAN, J. [After stating the case.] . . .

. . . We do not doubt the right of complainant to relief, so far as the defense is rested upon the plea. In the first place, by its charter, The Elyton Company was authorized to purchase the property of The Elyton Land Company, "provided that such sale is made under the laws now in force, and nothing in this act shall be construed to *impair*, or in any manner whatsoever to *affect* the rights of any stockholder of The Elyton Land Company." At the time of the sale and transfer of its property, The Elyton Land Company was solvent, a going corporation, and its stock was very valuable. Its duties and powers were fixed by its charter, and its business evidently managed with great skill and success, for the benefit of its shareholders. The Elyton Company by its charter was authorized to engage in many enterprises not within the scope of the powers of The Elyton Land Company. A shareholder in the latter might not be willing to become a shareholder in the other. By the sale and transfer of the property, The Elyton Land Company divested itself of all its property and capacity to continue the business for which it was organized. If the sale stands, the owner of stock in The Elyton Land Company is compelled to accept the stock of the new corporation, or hold stock in a corporation without capital assets. We lay no stress on the argument, that by its amended charter, The Elyton Land Company is authorized "to take stock" in other corporations. It was certainly never intended by that provision, to authorize The Elyton Land Company to effect its own dissolution by a sale of all its assets, and "take the stock" of another company in payment for distribution to the shareholders or any shareholder, without the consent and contrary to the preference of the shareholder. But it is too clear for argument, that the two million shares of stock of The Elyton Company were to be issued to The Elyton Land Company, as a mere conduit to the shareholder of The Elyton Land Company, and not to

be held and owned as capital assets of The Elyton Land Company. It may be that a private business corporation may sell out its entire property by and with the consent of less than all its stockholders, for the purposes of paying its debts, or for the purposes of dissolution and settlement, but when this is the purpose, it must be clearly understood, and the terms and conditions of the sale must be within the contractual relations between the corporation and its creditors or shareholders. There can be no presumption that a creditor or stockholder of the dissolved corporation will accept in payment of his demand, anything but money. He cannot be required to do so arbitrarily. While the plea shows the consent and ratification of the complainant to the issue of the certificate of twelve hundred dollars to the shareholder for each share of stock, and its subsequent payment by a dividend bond, it does not show consent or ratification of the sale of the property and the execution of the mortgage. It is manifest that the whole plan of organization of The Elyton Company, was in the interest of those who held the dividend bonds, without reference to the interest of the stockholder. These bonds at first maturing within three or four years were a lien or charge only upon $2,400,000 of its promissory notes, leaving all its other property unincumbered. By the arrangement, the dividend bonds, amounting to only $1,796,000, secured by a lien upon $2,400,000 of notes, were converted into gold bonds, running thirty years, and were secured by a mortgage upon all the property owned by The Elyton Land Company. The bonded indebtedness was increased over a half million dollars. The Elyton Company, from the pleading, did not own a dollar of capital other than that acquired by the purchase from The Elyton Land Company.

The facts set up in the plea do not present an estoppel as to the complainant whatever may be their effect upon the dividend bondholders, and the other stockholders, who aided in carrying out the arrangement, or have since ratified it. — *Kean* v. *Johnson*, 9 N. J. Eq. 401; *N. O. &c. R. R. Co.* v. *Harris*, 27 Miss. 517.

Decree of City Court affirmed.

MORRIS *v.* ELYTON LAND CO. *et al.*

1899. 125 Alabama, 263.[1]

Bill in equity, by Mrs. Susie M. Morris, a stockholder in the Elyton Land Company, brought for the same purpose as the bill in *Elyton Land Co.* v. *Dowdell, supra*, p. 466. The plaintiff was an infant at the time of the transactions complained of.

[1] Only so much of the report is given as relates to a single point. Arguments omitted. — Ed.

PARSONS *v.* TACOMA SMELTING AND REFINING CO.

1901. *Supreme Court of Washington*, 65 *Pacific Reporter*, 765.[1]

APPELLANT Parsons, original plaintiff, brings suit as a stockholder of the Tacoma Smelting and Refining Company against the corporation and its trustees, and the Tacoma Smelting Company. Parsons and certain other stockholders who have intervened and united with him as plaintiffs, pray for the cancellation of a lease executed by the Tacoma Smelting and Refining Company to the Tacoma Smelting Company.

The Tacoma Smelting and Refining Company was incorporated in 1887. It purchased a smelting plant and carried on business. In 1898, a proposition to lease all its plant and properties to a new corporation, called Tacoma Smelting Company, was submitted by the trustees to a meeting of the stockholders, and was then approved by a majority of all the stockholders. Before this meeting a majority of the stock in the old corporation had been purchased by the new corporation; and a large portion of this stock, represented by Rust as trustee, was voted on at the stockholders' meeting.

A lease for ten years was executed Dec. 6, 1898. It included all the properties, smelting plant, buildings, machinery, and all property of every description, whether real, personal, or mixed, belonging to the Tacoma Smelting and Refining Company, and also included a provision for purchasing all ore and finished products and supplies then on hand, at its market value, to be thereafter inventoried and appraised, and for which $30,000 was afterwards paid in settlement of the lessor's liabilities. The lessee also covenanted that within six months it would expend at least $30,000 in making improvements and betterments on the smelting plant; that it would pay $5,000 per annum rental, together with taxes, insure the property, and at the end of the term return the property in as good condition, wear and tear excepted, as when received.

At the time of executing the lease, the old corporation owed about $50,000 for borrowed money, and it had no funds on hand. Other facts as to the condition of the old corporation are stated in the opinion.

REAVIS, C. J. [After stating the facts; and holding that there was not a legal quorum of trustees present at the meeting of the board when a resolution was adopted in favor of leasing the property.]

The objects of the incorporation of the Tacoma Smelting & Refining Company are stated in its articles to be the building, acquiring, owning, and constructing and operating of works and buildings for the purpose of milling, reducing, smelting, and refining gold and silver ores, purchasing and handling of such ores, advancing moneys

[1] Statement abridged from opinion. Only so much of the report is given as relates to a single point. — ED.

thereon, and acquiring, purchasing, owning, and operating of such appliances and adjuncts as may be necessary or convenient for the prosecution of the business; the purchasing, owning, and acquiring of mines and all other lands that may be necessary or convenient in operating said business; and generally to do all other acts which, in the judgment of the trustees, may be proper or essential to the successful carrying on of the purposes and objects of the corporation. It is apparent that no express power to lease all the property of the corporation is contained in the articles. The articles of incorporation, as observed, are a contract. Each individual stockholder assumed the liability of the payment of his subscription to the capital stock in money or money's worth, and the corporation engages to carry on the business for which it is organized. Its business is managed by the board of trustees, but always within the fundamental limitations of the articles of incorporation. . . . The stockholders have equal rights to participate in the profits of the business according to the value of the stock owned by each, and each stockholder is entitled to the protection of his charter rights. He may insist that the business be conducted according to the articles; and, while the wishes of the majority of the stockholders are potent in the administration of all the business of the corporation, and, where exercised without fraud or oppression, are controlling upon the minority, yet the action of the majority cannot prevail where it impairs the contract right of a stockholder. The reasons urged for the necessity of the lease in question are that the Tacoma Smelting & Refining Company was unable to procure capital to conduct its business efficiently; that it had liabilities which were pressing, and had no available funds to make payment. It may be well to suggest an inquiry into the condition of the corporation at the time the proposal to lease the property was made. It had a plant of considerable value. It apparently exceeded in value the liabilities, and, while the amount is not definitely shown, it appears that a large portion of the subscriptions to the capital stock had not been paid. Mr. Rust testified that some of the subscribers to the capital stock had been requested to advance capital to conduct the business, but that no such advancements had been made. It is nowhere intimated that the board of trustees had attempted to exercise its appropriate powers to collect the unpaid subscriptions to the capital stock. In fact, it would seem, from the reasons suggested in the resolution adopted by the majority of the stockholders, that they did not desire this capital stock to be drawn upon in the prosecution of the corporate business. It cannot be concluded from the record before us whether other action by the board of trustees might not keep the corporation a going concern, and enable it to perform the objects of its organization. It may be implied from the testimony that a cogent reason for the action of the trustees was the enlargement of the smelting business by the organization of a new corporation, which should include within it the promoters and members of several large mining companies, so that the

product of those mines could be brought to the smelter, and a much larger business established. The promoters of the new corporation and of the lease evidently desired to secure control of the stock in the old company. The acceptance of the lease seems to have been upon condition that the new company acquire a majority of the stock. It is urged that under the circumstances surrounding the transaction the trustees had the power to execute the lease. The authorities cited by counsel for respondents have been examined, and those most pertinent will be considered.

[The learned Judge here commented on *Bartholomew* v. *Rubber Co.*, 69 Conn. 521; *Hennessy* v. *Muhleman*, 57 N. Y. Supp. 854; *Ardesco Oil Co.* v. *North American Oil & Min. Co.*, 66 Pa. State, 375; and *Plant* v. *Ice Co.*, 103 Georgia, 666. The opinion then proceeds.]

But, on the other hand, there are well-adjudged cases holding that a lease of all the property of a corporation cannot be made. That the stockholders cannot make such lease is ruled in *Copeland* v. *Gaslight Co.*, 61 Barb. 60. In *Small* v. *Matrix Co.* (Minn.) 47 N. W. 797, the Minneapolis Company leased its property to the Electro Matrix Company to carry on the same business and the lease was ratified by a majority of the stockholders. The court observed: "We do decide that such a surrender of the property, and, so far as possible, of the functions, of a corporation, in order that, while it is to still continue in existence, its business may be carried on by another corporation, to which such transfer is made, would violate the rights of a non-assenting stockholder arising from the contract, implied, if not expressed, in the creation of such an organization, and he would be entitled to have such acts restrained by injunction." The same declaration is made in *Black* v. *Canal Co.*, 24 N. J. Eq. 455. In *Byrne* v. *Manufacturing Co.* (Conn.) 31 Atl. 833, a corporation was organized for the purpose of succeeding to and carrying on the business of an insolvent corporation. The court declared that this could not be done; that such a transfer would be sustained only when the purpose was a bona fide winding up of the business of the existing corporation, and that any dissenting stockholder could maintain an action to enjoin such a disposition of the corporate property. A distinction may be observed between a sale of all the property and a lease of all the property. In that of a sale no further liability rests upon the stockholder. The corporation is in fact discontinued. In that of the lease the business is discontinued, and the profits derived by the lessee, but the stockholders' obligations may continue. Under our statutes the corporate existence is limited in time. This was not usual in the older cases. And, further, section 4275, 1 Ballinger's Ann. Codes & St., contains the complete procedure for the dissolution of the corporation at the will of two-thirds of the stockholders. These statutes apparently contemplate the conduct of the business for which the corporation is organized through its own appointed agencies, or, at the choice of two-thirds of the stockholders, a dissolu-

tion. It is true, an insolvent corporation may make an assignment for the benefit of its creditors against the will of a non-consenting stockholder, and probably any appropriate proceedings in equity might be taken to relieve a failing corporation by such disposition of its property as should be equitable, which did not violate any contractual relations of the stockholders. It is concluded upon the whole record presented here that the lease in controversy is voidable at the suit of a non-consenting stockholder.

[It was then *held*, that the new corporation had no right to purchase shares in the old corporation for the purpose of controlling its property and business. The opinion concludes.]

It appears that the appellants are entitled to have the lease adjudged void, and, further, that the stock of the Tacoma Smelting & Refining Company owned by the new company shall not be used in voting at stockholders' meetings in the old company. The judgment is reversed, with direction to the superior court to adjudge the lease void, and that it be cancelled, and that the Tacoma Smelting Company be enjoined from voting the stock held by it in the Tacoma Smelting & Refining Company.[1]

DUNBAR, FULLERTON, and ANDERS, JJ., concur.

VAN SYCKEL, J., IN BLACK *v.* DELAWARE AND RARITAN CANAL CO.

1873. 24 *New Jersey Equity*, 455, pp. 464-466.

[THE questions arose upon a bill filed to enjoin the United Companies of New Jersey from executing a lease of their roads and canal to the Pennsylvania Railroad Company for the term of 999 years.]

VAN SYCKEL, J. . . . The certificate for stock declares that the holder is entitled to a certain number of shares of the capital stock, which consists of the corporeal works and property, with valuable franchises to be used by the corporation for their profit, by the taking of tolls and fares; with the right to acquire and dispose of such

[1] "It has been suggested that a power of sale must include the power to exchange, because the greater includes the less; but no such comparison can properly be made, as neither includes the other, and neither is part of the other. In the event of a sale, properly and fairly conducted, whether by public auction, by sealed bids, or by any other method calculated to produce the best result attainable, each of the stockholders has an equal right to become the purchaser of the whole or any part of the corporate assets, each is equally interested in obtaining the highest price for the common property, and each is entitled to an equal *pro rata* share of the proceeds; but if the holders of any number of shares, however large, be authorized to exchange the corporate assets for the capital stock of a foreign corporation, the law furnishes no measure by which to determine the prudence or wisdom of the exchange or to test the fidelity of those clothed with the power and charged with the duty incident to such proceedings."

PIGOTT, J., in *Forrester* v. *Boston & Montana &c. Co.*, A. D. 1898, 21 Montana, 544, p. 562. — ED.

WELLS, J., IN BREWER v. BOSTON THEATRE *et al.*

1870. 104 *Massachusetts*, 378, pp. 394–397.[1]

WELLS, J. . . . The defendants contend that the corporation cannot be deprived of its right to determine, in all matters not *ultra vires*, whether to impeach or to ratify transactions supposed to be prejudicial to its interests. Granting this position, it would result that in no case, as to matters *intra vires*, could a suit be maintained by individual stockholders to enforce rights or redress wrongs of the corporate body, except where the delay necessary in order to secure corporate action might defeat or endanger the attainment of appropriate relief. If, when called upon to act, the corporate body should elect to confirm the supposed wrongful transactions, or should do so indirectly by refusal to act, they would no longer be open to impeachment. If, on the other hand, it should determine to take action, it would do so in its own name and behalf; and there would be no ground of necessity for proceedings in the name of the individual corporator.

We are not prepared to say that this would not be the case in all matters to which the only objection is that they are prejudicial, or supposed to be so, to the corporate interests merely, but not illegal in themselves, and affecting all the corporators alike. Perhaps it would be so whenever the surrender of property or the release of rights, acquired by the corporation through the transactions sought to be impeached, is necessary in order to reach the proper remedy. *Great Luxembourg Railway Co.* v. *Magnay*, 25 Beav. 586. The corporation might be entitled to determine for itself exclusively whether it would retain or release property or rights thus acquired, although it thereby precluded, or rendered ineffectual, all proceedings against parties who may have made illegal or fraudulent gains out of the transactions. These questions, however, we need not at present decide.

The cases now before us involve no release of property or rights by the corporation. The alleged wrongs are not merely prejudicial to the interests of the corporation; but are such as tend to deprive one part of the corporators of their rightful share in the fruits of the common property and business, for the advantage of others of the corporators. This inequality and injustice is accomplished by means of the control over the corporate organization and management, which has been secured by the parties so benefited. By the amendments to the several bills it is alleged that such control has been exercised since the year

[1] This was a bill in equity, brought by minority stockholders, against the corporation and against certain directors and other individuals, for fraudulently conspiring to lease the corporate property on a rent much below the market value and share in the profits of the lessees. The bill (as amended) alleged that individual defendants own or control a majority of the stock and control the proceedings at stockholders' meetings; also that a majority of the directors are fraudulently colluding with these defendants to continue to them the control of the corporation and its property. A demurrer was overruled. — ED.

1866, inclusive, by Tompkins and Thayer, with the aid of the other defendants. That which is important is the fact of such control and its exercise for such purpose, rather than the means by which it has been obtained. A majority of the corporators have no right to exercise the control over the corporate management, which legitimately belongs to them, for the purpose of appropriating the corporate property or its avails or income to themselves or to any of the shareholders, to the exclusion or prejudice of the others. And if any have obtained such unfair advantage by fraud or abuse of the trust confided to them as officers or agents of the corporation, it is not in the power of a majority to ratify or condone the fraud and breach of trust, so far as it affects the rights of the others, without reasonable restitution. This proposition, if stated in reference to formal transactions, such as assessments of capital or dividends of income, would not be questioned. *Preston* v. *Grand Collier Dock Co.*, 11 Sim. 327. *Hodgkinson* v. *National Live Stock Insurance Co.*, 26 Beav. 473. But the indirect appropriation of the common property, profits or means of profit, to their own benefit, by any portion of the corporators, in fraud of their associates, is equally incapable of being authorized or ratified by the vote of a majority of the corporators, or by any act or omission of the corporate body. *Gregory* v. *Patchett*, 33 Beav. 595. *Atwool* v. *Merryweather*, Law Rep. 5 Eq. 464, note. If it were otherwise, the minority would be without means of protection or redress against inequality and injustice. They would be equally so if they could obtain redress only in the name and through the action of the corporation itself. Such acts are wrongs done primarily to the corporation; and therefore the restitution or redress is to be secured to the corporation. But in their effect and essential character they are wrongs to the individual shareholder, inflicted upon his corporate interests by means of the control over those interests secured through the corporate organization and management. He can seek his redress only through the corporation; but that does not give the corporation the right to deprive him of all redress. Any attempt to do so, whether regarded as the action of the corporation or of a majority of shareholders, would have the same voidable character as the original wrong. Officers of a corporation, dealing with it in matters of their own individual interest, stand very differently in this respect from strangers, who have no occasion to regard any other than the corporate body. If by means of their relations to the corporate management they secure to themselves undue advantage over their associates, they cannot retain it. Such transactions are voidable, not merely for want of authority in the officers by whom they are done, but because neither the officers nor the corporation itself, by whatever majority of votes it may act, can do, assent to, or confirm them. The wrong to the individual shareholder is the same, whether committed with the concurrence or subsequent approval and adoption of his associates controlling the corporation, or without it.

B. The Action by Officials.

(1) *Executive Boards.*

HENRY RYDER v. WILLIAM WILCOX.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1869.

[*Reported in* 103 *Massachusetts Reports*, 24.]

CONTRACT. Writ dated July 26, 1867. The declaration was as follows: "And the plaintiff says the defendant made a contract in writing with him, a copy whereof is hereto appended and made part of this declaration, whereby the defendant agreed to enter into and carry on with the plaintiff the business of manufacturing and selling oil and candles in the manner and upon the terms set forth in said written contract; and the plaintiff avers that he has in all respects well and truly performed the promises and agreements on his part to be kept and performed under said contract; but that the defendant, without sufficient cause or justification, has failed and refused to perform his promises and agreements in said contract contained, and has violated said contract, in this: that he has arbitrarily, and against the will of the plaintiff, and without sufficient cause or justification, entirely and completely excluded the plaintiff from all participation in the conduct and management of said business and in the profits thereof, and has arbitrarily assumed the exclusive management, control, and profit thereof to himself, without regard to the rights of the plaintiff; and that the said defendant has failed and refused to make an annual settlement of account with the plaintiff, and annual payment, in accordance with the terms of said contract; and that though the defendant has continued said business to the present time upon the premises, and with the tools and appliances of the plaintiff, and has made large profits therefrom, yet he has refused to acknowledge and recognize that the plaintiff has any rights under the contract."

The contract declared on, which was signed by the parties and dated October 2, 1865, was as follows: "The said Wilcox does hereby agree to enter into, establish, and carry on the business of manufacturing lubricating and other oils and paraffine candles, under the name, style, and firm of 'The New Bedford and Ohio Oil and Candle Company,' and to furnish the capital necessary for carrying on said business to the amount of £50,000. The business is to be carried on at New Bedford and also in the State of Ohio, and is to be continued for the term of three years from the seventeenth day of April last past; and the said Ryder is to be employed as the general agent, superintendent, and manager of said business. And the said Ryder does hereby agree to take charge of

said business as the agent, manager, and superintendent of the same, and to devote all his time, attention, skill, and knowledge to said business, and to exert his best endeavors to secure the success and prosperity of said business during the said term of three years from the seventeenth day of April last past.

"And it is further agreed by and between the said parties, that the said Ryder shall receive in payment for his said services the sum of $1,000 per year during the said term, and one-half of the net profits of the said business. Annual settlements are to be made, and all sums due to said Ryder on said settlements are to be paid; or, if not paid, the amount is to be credited to him, and interest is to be allowed him on the same. And the said Wilcox is not to reduce the capital of said company below the sum of $50,000 during the term of his contract.

"And the said Ryder does further agree to hire and let to said company his oil works, buildings, fixtures, tools, and apparatus for manufacturing oil and paraffine candles at New Bedford, at and for the rent of $1,600 per year during the term of this contract. The buildings are to be kept in repair by the said Ryder, but the tools, fixtures, machinery, and apparatus are to be kept in repair by the company, and are to be returned to said Ryder in equal value at the end of this contract. The said company are also to have the use and benefits of all trade marks, names, and patents now used by said Ryder, free of any charge, during the time of this contract, and the same are to be redelivered to said Ryder at the expiration of this contract, free from any claim or charge.

"And the said Wilcox does further agree that the said company shall have the use of his coal lands, oil works, mining apparatus, &c., in the State of Ohio, and the right to receive coal as much as shall be desired for the use of the company; for which, and the use of his said works and apparatus, he is to be allowed and paid by said company the sum of fifteen cents per ton. All necessary repairs on said works and apparatus are to be made by the company.

"All the operations of the late limited partnership of 'Henry Ryder' since the seventeenth day of April last are to be considered as done and performed under this agreement so far as the business of the company is concerned, and this agreement relates back to the seventeenth day of April last past.

"The said Wilcox is to be allowed interest on the capital stock invested in said company, at the rate of bank interest in Massachusetts."

The defendant demurred because the declaration set forth no cause of action; and the case was thereupon reserved by Foster, J., for the determination of the full court.

T. D. Eliot and *T. M. Stetson*, for the defendant.

E. L. Barney, for the plaintiff.

COLT, J.[1] It is alleged, in substance, that the defendant has excluded the plaintiff from the management and profits of the partnership business; has refused to make annual settlements, and payments thereon; and, although he has continued the business upon the premises and with the tools of the plaintiff, and made large profits, has refused to recognize the plaintiff's rights under the contract. The action is brought before the expiration of the time limited for the duration of the partnership, and without any formal dissolution of it. It is not for the recovery of an ascertained general or special balance belonging to the plaintiff. There can be no recovery at law of the profits of the business, so long as it is possible, upon a final settlement and account between the partners, that the plaintiff might be liable to refund. It is not sought to charge the defendant as upon an agreement preliminary to the commencement of business, made for the purpose of launching the partnership, like promises to furnish capital; or upon separate securities given by one partner to another on partnership account; or where there has been a voluntary separation of funds from the partnership stock, and one partner is alone interested in the contract relating to it.

It is said that an action at law for damages for the breach of an express agreement, entered into by one partner in favor of another, will only lie where the action can be properly tried without going into the partnership accounts, and the damages sought will belong exclusively to the plaintiff, and where the plaintiff will not be liable in any contingency, affecting the future joint business, to contribute to his own payment. Lindley Part. 731, 740.

But, without stopping to inquire whether this action can be maintained without violating these rules, it is sufficient to say that, whatever the nature of the agreement, it must be one in which the defendant binds himself personally to the plaintiff. We cannot find, in the instrument declared on that the defendant did bind himself personally to make good to the plaintiff any certain sum as his share, if the partnership assets should prove deficient. The stipulations in this regard are to be construed not as personal covenants between the parties as individuals, but rather as provisions defining and regulating the mode in which the business of the company should be conducted and the profits divided. The agreements, on the other hand, for contribution to the partnership funds and property which each is to make, are made binding by name on each, and would no doubt be classed with those express

[1] A portion of the opinion, in which the court decided that the contract declared on constituted a partnership, is omitted. — ED.

agreements which may be the foundation of an action. Venning v. Leckie; Brown v. Tapscott.

The principles we are considering are illustrated in the case of Paine v. Thacher,[1] where it was held that, if one partner promises another partner to pay him a compensation for personal attention to the business of the concern, this promise may be enforced at law, notwithstanding the existence of the partnership and written articles providing for such payment. Nelson, C. J., says, in this case, that the item for services had been adjusted, and there was an express promise to pay it, and the compensation was to be contributed "as a part of the capital, to be furnished by the defendant in lieu of personal attention."

It is plain that there can be no recovery at law for work and labor for the firm or for contributions to its funds, in the absence of an express agreement of the defendant; and the plaintiff does not aid his case by alleging a willingness to perform, and a prevention by the defendant.

The rights of the parties are regulated by the general principles of the law of partnership, when not changed by special agreement. They are joint owners and possessors of the capital stock, funds, and effects of the company. Each has equal right to the possession, and equal right in the conduct and management of the joint business, and is clothed with like authority.

In the opinion of the court, upon the case stated in this declaration, no action at law can be maintained. If the declaration could be taken as alleging an entire repudiation by the defendant of the contract and of the relation of partnership, with a claim of damages for such a breach of the contract, instead of compensation for services in conducting the business, and for a share of its profits, such an action might be maintainable. We do not so understand its allegations. A failure and refusal by the defendant to perform his promise and agreement is indeed charged, together with an exclusion of the plaintiff, and a refusal to acknowledge that he has any rights under the contract. But it also alleges a refusal to make the annual settlement of accounts and annual payments, according to the contract, and sets forth a continuance of the business upon the premises and with the tools and appliances of the plaintiff, with large profits therefrom, from a participation in which he has been excluded. The remedy in such cases is in equity, where the power to investigate accounts, to compel specific performance, and to restrain breaches of duty for the future, affords the only relief which can be had.

In Capen v. Barrows,[2] it was held that an action at law to recover damages, brought by one partner against his copartner, for neglect of

[1] 25 Wend. 450. [2] 1 Gray, 376.

partnership business, could not be maintained while the affairs of the firm remain unsettled, although it was expressly agreed that each partner should devote his whole time to the partnership business. The principle of that case is applicable here. Fanning *v.* Chadwick;[1] Williams *v.* Henshaw;[2] Holmes *v.* Higgins. *Demurrer sustained.*[3]

[1] 3 Pick. 420.
[2] 11 Pick. 79; Met. Con. 133.
[3] See also Stone *v.* Fouse, 3 Cal. 292; Capen *v.* Barrows, 1 Gray, 376. — Ed.

CHAPTER X.

DIRECTORS.

SECTION I.

Powers of Directors.

GASHWILER *v.* WILLIS.

1867. 33 *California*, 11.[1]

ACTION for false representation. The defendants were stockholders in a California corporation, The Rawhide Ranch Gold and Silver Mining Company. Plaintiffs averred that they were induced to purchase, on October 2, 1865, the company's mine; and that this purchase was induced by the false representations of defendants as to the terms of a trust deed which had been executed by the corporation to Barney, June 5, 1865, and under which other parties had a better title than plaintiffs acquired by their subsequent purchase in October.

On April 29, 1865, at a stockholders' meeting, at which all the stockholders were present, a resolution was unanimously adopted authorizing Turner, Willis, and Hodges, Trustees of the corporation, for and on behalf of the corporation, to sell and convey the mine to Barney. In pursuance of said resolution, and without any other authority shown, a conveyance was executed to Barney, on June 5, by said Trustees, purporting to be the deed of the corporation. The deed was signed by the Trustees, for and on behalf of the corporation; the Trustees affixing their own seals, "the said corporation having no seal."

On the trial, after proving the adoption of the resolution, plaintiffs offered in evidence the said deed of June 5, which was excluded by the court. To this exclusion, the plaintiffs excepted, and the case came up on appeal.

H. P. Barber, and *James H. Hardy*, for Appellants.

John B. Hall, and *Caleb Dorsey*, for Respondents.

SAWYER, J. . . .

Under the view we take, it will only be necessary to consider the

[1] Statement abridged. Argument and parts of opinion omitted. — ED.

first ground of the objection, and the question is, does the instrument in question appear to be the act or deed of the corporation?

. . . . . .

We are not aware of anything in the law, independent of any authority expressly conferred by the corporation, which authorizes Turner, Willis and Hodges, in their official character as Trustees, to execute the instrument in question on behalf of the corporation. No law of the kind has been called to our attention, and we do not understand that any is claimed by appellants' counsel to exist. And there is nothing in the nature of those offices, as connected with the object and business of the company, from which a general power in the Trustees, when not acting as a Board, to sell and convey the mine, mill and other property of the company, could be implied. (*McCullough* v. *Moss*, 5 Den. 575.) The parties executing the instrument, then, if they had any authority in the premises, must have derived it from some corporate act; and the only act proved or relied on is the resolution adopted at the stockholders' meeting before mentioned. This was a meeting of the stockholders only. It was called as such, and the proceedings all appear to have been conducted as a stockholders' meeting. The resolution authorizing the sale and conveyance of the mine, etc., in question, was adopted by the stockholders, as such, at said meeting, and not by the Board of Trustees, or at any meeting of said Board. The Board of Trustees do not appear to have ever acted at all upon the matter in the character of a Board, but the testimony shows that they acted in pursuance of the said resolution adopted at the meeting of stockholders.

Section five of the Act authorizing the formation of corporations for mining purposes provides: "That the corporate powers of the corporation shall be exercised by a Board of not less than three Trustees, who shall be stockholders," etc. And section seven provides that: "A majority of the whole number of Trustees shall form a Board for the transaction of business, and every decision of a majority of the persons duly assembled as a Board shall be valid as a corporate act." (Laws 1853, p. 88, Sec. 5; 7 Hittell's Gen. Laws, Arts. 936, 938.) Conferring authority to sell and convey the corporate property is the exercise of a corporate power, and under these provisions the "corporate powers of the corporation" are to be exercised by the Board of Trustees when the majority are "duly assembled as a Board." When thus assembled and acting the decision of the majority "shall be valid as a corporate act." We find nothing in the Act authorizing the stockholders, either individually or collectively in a stockholders' meeting, to perform corporate acts of the character in question. The property in question was the property of the artificial being created by the statute. The whole title was in the corporation. The stockholders were not in their individual capacities owners of the property as tenants in common, joint tenants, copartners or otherwise. (*Gorham* v. *Gilson*, 28 Cal. 484; *Mickles* v.

Rochester City Bank, 11 Paige, 128.) This proposition is so plain that no citation of authorities is needed. Had the stockholders all executed a deed to the property, they could have conveyed no title, for the reason that it was not in them (*Wheelock* v. *Moulton et al.*, 15 Vt. 521); and what they could not do themselves they could not by resolution or otherwise authorize another to do for them. The corporation could only act — could only speak — through the medium prescribed by law, and that is its Board of Trustees. As well might the citizens of San Francisco in public meeting assembled, by unanimous resolution authorize certain Supervisors, designated by name, to sell and convey the City Hall. It is said, however, that the Trustees were also all present and participated in the proceedings at the stockholders' meeting and assented to the resolution; that the resolution therefore was approved by all of the constituents of the corporation, and the powers of the corporation were exhaustively exercised. But they were acting in their individual characters as stockholders, and not as a Board of Trustees. In this character they were not authorized to perform a corporate act of the kind in question. As well, also, might a valid ordinance be passed by the citizens of San Francisco in public meeting assembled, at which the Supervisors were all present and voted in the affirmative. Such an ordinance, when signed by the Mayor, would have the assent of all the constituents of the corporation as clearly as the resolution in question has in the present instance. But such is not the mode in which the corporation is authorized by the law of its creation to manifest its will and exercise its corporate powers. The power to sell and convey could only be conferred by the Trustees when assembled and acting as a Board. This is the mode prescribed. As a Board they could perform valid corporate acts, and confer authority within the province of their powers, upon the Trustees individually or upon any other parties to perform acts as the agents of the corporation. We are not without authorities upon this precise point.

In *Conro* v. *Port Henry Iron Company*, 12 Barb. 27, the same question arose. A lease of the company's iron works was made in pursuance of a resolution adopted at a meeting of the stockholders at which the Directors were present. It was held that the resolution imparted no authority to make the lease. The Court say: "The stockholders in this case had no power to make a lease or do any other administrative act in the management of the affairs of the corporation. If a lease could be made at all, it could be executed only in pursuance of the act of the Directors, who are the body appointed by the charter for the management of its affairs. It is no answer that the individual stockholders, who were present at the meeting when the lease was ordered, were also Directors. They did not meet as Directors, but as stockholders. The Mayor and Common Council of a municipal corporation can only act in the manner prescribed by law. When not acting in their official character and in the mode prescribed by law,

their acts are no more binding than those of other private citizens. (See, per Lord Mansfield, *Rex* v. *Head*, 4 Burr. 2,515, 2,521.)" (Ib. 63.)

[After commenting on various cases.] These cases are in point, and none to the contrary have been called to our attention. They are the necessary consequence of the principles established by the great body of the authorities, that the corporate powers of corporations can only be exercised in the mode and through the instrumentalities prescribed by their charters. In this case, the resolution adopted by the stockholders was not a corporate act, and it conferred on the three Trustees named — whether they constituted the whole number of Trustees does not appear — no authority to perform a corporate act, to execute the deed, or adopt a seal for the occasion. It not only does not appear, then, that the instrument in question is the act or deed of the corporation, but it affirmatively appears that it was executed in pursuance of a resolution that conferred no authority whatever to perform a corporate act; for the plaintiffs themselves introduced in evidence the authority under which they claimed the act to have been performed, and upon which they relied. Having done this, we are not at liberty to indulge the presumption that the parties executing the deed on behalf of the corporation were otherwise duly authorized. The authority acted upon is affirmatively shown, and this fails. We think the deed properly excluded. But even if it had been admitted without further proof of the authority of the parties to execute it, it would not have availed the plaintiffs. As there does not appear to have been any authority in the parties assuming to act, to sell or convey at all, it is unnecessary to discuss the other questions.

Judgment affirmed.

Mr. Justice RHODES did not express an opinion.

By the Court, SAWYER, J., on petition for rehearing:

The consequences assumed as the only basis of the argument in the petition for rehearing do not follow from anything determined or in any way suggested in the opinion in this case. We have nowhere held, or even intimated, that the Board of Trustees of a corporation can convey all the property of the corporation necessary to enable it to carry on the business for which it was organized, or do anything else destructive of the objects of its creation without the consent of its stockholders. We have not even held that it was competent for the Trustees, acting as a Board, to authorize the conveyance of the property now in question without the consent of the stockholders. There was no such question in the case. We simply held that the stockholders themselves could not authorize the Trustees, acting as individual Trustees, or anybody else, to convey it — that nobody could convey it unless authorized by some act of the Board of Trustees, acting as a Board. It may be conceded for the purposes of this case that the Board of Trustees itself could not authorize a convey-

and that power being vested in the directors without restriction, it must follow that they, and they alone, are authorized to make it. It is the duty of the directors to care for the creditors, and when the corporation becomes crippled and unable to meet its obligations in the usual course of business, it is competent for the directors to make an assignment, and this they may do without the consent of the stockholders. This conclusion has the support of adjudications of this and other courts. *Chew* v. *Ellingwood*, 86 Mo. 260; *Dana* v. *The Bank of the United States*, 5 W. & S. (Pa.) 223; *DeCamp* v. *Alward*, 52 Ind. 473. The directors may, with propriety, consult with the stockholders, but under the circumstances just stated, and in the exercise of their best judgment, they may make the assignment even against the expressed will of the stockholders. Of the cases relied upon by the appellants, that of *Abbott* v. *American Hard Rubber Co.*, 33 Barb. 580, was not an assignment for the benefit of creditors. There the trustees attempted, through the form of a sale, to secure to themselves the property of the corporation at the expense of the other stockholders. The sale was voidable, as to the stockholders not consenting, though a majority agreed to the transaction.

. . . . . .

CHICAGO CITY RAILWAY COMPANY *v.* ALLERTON.

1873. 18 *Wallace* (*U. S.*), 233.

APPEAL from the Circuit Court for the northern district of Illinois; the case being thus:

The Chicago City Railway Company was a corporation owning a street railroad in Chicago. The directors of the company, without consulting the stockholders or calling a meeting of them, resolved to increase the capital stock of the company from $1,250,000 to $1,500,000. To this one Allerton, who was a stockholder, objected, and filed a bill praying for an injunction to prevent the increase. His position was that it could not be lawfully made without the concurrence of the stockholders, and in support of this view he relied upon the constitution of Illinois, adopted in July, 1870, by the thirteenth section of the eleventh article of which it is declared as follows: —

"No railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created, and all stock-dividends, and other fictitious increase of the capital stock, or indebtedness of any such corporation, shall be void. The capital stock of no railroad corporation shall be increased for any purpose, except upon giving sixty days' public notice in such manner as may be provided by law."

He also relied on an act of the legislature of Illinois, passed March 26th, 1872, to execute and carry out the above provision of the consti-

tution, by which, amongst other things, it was enacted that no corporation should change its name or place of business, increase or decrease its capital stock, or the number of its directors, or consolidate with other corporations, without a vote of two-thirds of the stock at a stockholders' meeting.

The railway company, in its answer, relied upon its charter, granted February 14th, 1859, the third and fourth sections of which were as follows:

"SECTION 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time, at the pleasure of said corporation.

"SECTION 4. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint."

The position of the company was that the third section conferred an unrestricted right to increase the capital stock at will, and that the fourth vested this power in the board of directors, and that the constitutional provision and act above referred to, if applied to this corporation, would impair the validity of the contract. It was further set up, however, that the said provision did not apply to railways worked by horse-power. The court decreed in favor of the complainant and the company took the present appeal.

Mr. Charles Hitchcock, for the appellant; *Mr. D. A. Storrs, contra.*

Mr. Justice BRADLEY delivered the opinion of the court.

Without attempting to decide the constitutional question, or to give a construction to the act of the legislature, we are satisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose, and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association.

Authority to increase the capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter; but such a law should regularly be accepted by the stockholders. Such assent might be inferred by subsequent acquiescence; but in some form or other it must be given to render the increase valid and binding on them. Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their char-

acter, and cannot, on general principles, be made without the express or implied consent of the members. The reason is obvious.

First, as it respects the purpose and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust.

Secondly, as it respects the constituency, or capital and membership. This is the next most important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders, would be to make them members of an association in which they never consented to become such. It would change the relative influence, control, and profit of each member. If the directors alone could do it, they could always perpetuate their own power. Their agency does not extend to such an act unless so expressed in the charter, or subsequent enabling act; and such subsequent act, as before said, would not bind the stockholders without their acceptance of it, or assent to it in some form. Even when the additional stock is distributed to each stockholder *pro rata*, it would often work injustice, because many of the stockholders might be unable to take their respective shares, and might thus lose their relative interest and influence in the corporate concern.

These conclusions flow naturally from the character of such associations. Of course, the associates themselves may adopt or assent to a different rule. If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote, in the regular way. Perhaps a subsequent ratification or assent to a change already made, would be equally effective. It is unnecessary to decide that point at this time. But if it is desired to confer such a power on the directors, so as to make their acts binding and final, it should be expressly conferred.

Where the stock expressly allowed by a charter has not been all subscribed, the power of the directors to receive subscriptions for the balance may stand on a different footing. Such an act might, perhaps, be considered as merely getting in the capital already provided for the operations and necessities of the company, and, therefore, as belonging to the orderly and proper administration of the company's affairs. Even in such case, however, prudent and fair directors would prefer to have the sanction of the stockholders to their acts. But that is not the present case, and need not be further considered.

Decree affirmed.

SWENTZEL *v.* PENN BANK.

1892. 147 *Pa. State*, 140.[1]

Bill in Equity, praying that directors of the Penn Bank be decreed to pay all moneys lost by their carelessness, negligence and fraudulent management. Facts found by a master, who recommended that the bill be dismissed as to most of the defendants. The assignee of the Bank filed exceptions to the report, and alleged error in various rulings and decrees made in the court below.

H. A. Miller, *D. F. Patterson*, and *A. M. Brown*, for the assignee.

S. Schoyer, Jr., *D. T. Watson*, and others, for various defendants.

Paxson, J. . . . Briefly stated, the bill was filed for the purpose of holding the officers and directors of the bank responsible for the losses resulting from its failure. It is claimed that the officers and directors were negligent in their management of the bank's affairs, and that by reason of such negligence the losses occurred.

It is conceded on all sides that the losses and the disastrous failure of the bank were directly traceable to Mr. Riddle, its late president, now deceased. He practically emptied the vaults of the bank in carrying on a gigantic speculation in oil. This was done with the knowledge of the cashier, and the coöperation of one or more clerks or subordinates. It would have been extremely difficult, if not practically impossible, for any person to have committed such a swindle without the coöperation of some one inside. The question is whether the directors ought to have known of these transactions, and whether their failure to know what the real plunderer was doing, was such negligence on their part as to render them liable to the creditors of the bank.

The Penn Bank closed its doors in May, 1884. It is not too much to say that its failure was a great shock to the business interests of Pittsburgh. It was the cause of much excitement; led to a large amount of litigation, much of it directed against the board of directors. As usual, in such cases, the current of public opinion was turned against them, and up to the present time they have been defending themselves against hostile litigation. The time has now arrived when the rights of the parties can be considered calmly, and disposed of in disregard of prejudice or popular clamor.

The first question that naturally suggests itself for our consideration is, the extent of the duty which the directors of a bank owe to the stockholders, whom they represent directly, and the creditors, whom they represent indirectly.

Upon this point there is a general misapprehension in the popular mind. This finds expression, after bank failures, in severe condemnation of directors, and a general assertion of the doctrine that their

[1] Statement abridged. Arguments and part of opinion omitted. — Ed.

duty requires them to be familiar with all the details of the management. In the popular mind they are held to the rule that they ought to take the same care of the affairs of the bank that they do of their own private business. Even the learned judge below evidently adopted this view, when he said in his opinion: "If we were to decide this case on first impressions, as to the conclusions of fact to be drawn, and under the decisions cited and rules laid down in the minority opinion in *Briggs* v. *Spalding*, we would say there was gross negligence, or want of the ordinary care that a man of fair intelligence would take of his own affairs."

It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatory. His principal business at the bank is to assist in discounting paper, and for that purpose he attends at the bank at stated periods — generally once or twice a week — for an hour or two. The condition of the bank is then laid before him, in order that he may know how much money there is to loan. Once or twice a year there is an examination of the condition of the bank, in which he participates. The cash on hand is counted, the bills receivable and sureties examined, to see whether they correspond with the statement as furnished by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in the care of salaried officials who are paid for such services, and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business, is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank, doing a large business, he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs.

A vast amount of authority has been cited upon this question, which we do not think it necessary to review. It is sufficient to refer to a few cases only. In *Spering's Ap.*, 71 Pa. 11, the subject is very fully discussed by the late Justice SHARSWOOD, and the rule of ordinary care is laid down. Not, however, the ordinary care which a man takes of his own business, but the ordinary care of a bank director in the business of a bank. Negligence is the want of care according to the circumstances, and the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs means one thing; the ordinary care of a gratuitous mandatory is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give in a short space of time to the business of other persons, from whom he receives no compensation.

The same learned judge, in *Maisch* v. *Saving Fund*, 5 Phila. 30, laid down the rule as follows: "As to the directors, however, receiving no benefit or advantage, they can be considered only as gratuitous mandatories, liable only for fraud or such gross negligence as amounts to fraud." Again, in *Spering's Ap.*, *supra*, he said: "Indeed, as the directors are themselves stockholders, interested, as well as all others, that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill."

We may also refer to *Briggs, Receiver*, v. *Spaulding* 141 U. S. 132, which goes even further than our own cases upon this point. It does not relieve a director from the consequence of gross negligence in the performance of his duty, but it holds that he is not responsible where he has used the ordinary care which bank directors usually exercise. It is true this was the case of a national bank, but we apprehend that what is negligence on the part of a director of a national bank, would, as a general rule, be negligence by a director of a state bank, and subject to the same liability.

In regard to what is ordinary care, regard must be had to the usages of the particular business. Thus, if the director of a bank performed his duties, as such, in the same manner as they were performed by all other directors of all other banks in the same city, it could not fairly be said that he was guilty of gross negligence. And care must be taken that we do not hold mere gratuitous mandatories to such a severe rule as to drive all honest men out of such positions. This thought is so well expressed by Sir George Jessel, M. R., in his opinion in *In re Penn Coal Mining Co.*, 10 Ch. Div. 450, that I give his remarks in full: "One must be very careful in administering the law of joint-stock companies, not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and, perhaps, all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Willful default no doubt includes the case of a neglecting to sue, though he might, by suing earlier, have recovered a trust fund; in that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle."

Holding, then, the rule to be that directors, who are gratuitous mandatories, are only liable for fraud, or for such gross negligence as amounts to fraud, it remains but to apply this principle to the facts of this case.

It is not alleged — it has never been alleged — that the hands of these directors are stained by fraud. The bank was wrecked by its

president, with the cashier and some of the clerks aiding and abetting. It was adroitly done, so far as the means were concerned, and it was concealed wholly from the directors. False entries were made in the books, and false accounts, or accounts with fictitious persons, were opened so as to hide the theft. The reports of the bank's condition, made by the president to the directors, from time to time, showed it to be in good condition, while in point of fact it was honeycombed with fraud, and its assets squandered in wild speculations. It may be asked, why did not the directors discover this by an examination of the books? The answer is, that, if they had examined every book in the bank, with a single exception, they would not have found the fraud. That exception is the individual ledger. All the frauds were dumped into this book, and appeared nowhere else. The individual ledger contains the accounts of the individual depositors, and this book, by the rules of a large majority of the Pittsburgh banks, the directors are not allowed to see. This is a rule of policy on the part of most city banks, and the reason for it is, at least, plausible. A director, largely engaged in business, may have a number of rivals in the same business who are depositors in the bank. If he is permitted to examine their accounts it gives him an advantage and an insight into a rival's affairs that few business men would tolerate. Hence, it is a question with many banks whether to adopt this rule or lose valuable customers, and they generally prefer the former. We are not speaking of the wisdom of the rule, only of its existence, as bearing upon the question of the directors' negligence. Are they to be held to be guilty of gross negligence in not examining a book, which, by the rules of their own bank, and of four fifths of the other banks in Pittsburgh, the directors were not permitted to see?

Nor do we think the directors were bound to regard the statements submitted to them as false, and the president, cashier and clerks as thieves. They had nothing to arouse suspicion. All of these gentlemen stood high; they were the trusted agents of the corporation; paid for their services, and regarded in the community in which they lived as honest men.

Aside from this, the directors were among the heaviest stockholders of the bank. They collectively owned a large proportion of it. And so thoroughly were they deceived by the president as to its condition that, when the first stoppage occurred, they not only believed the suspension was temporary, but they showed their faith by their works, and upon their individual credit raised the sum of $289,000 to enable it to resume. They did not desert the ship like a parcel of drowning rats, but imperiled their private fortunes in an effort to keep it afloat. Under such circumstances it would be an act of gross injustice to hold them liable for the frauds of others, in which they had not participated — of which they had no knowledge — and which have only been brought to light with the aid of experts. We must measure this transaction by the light which these directors had at the time the

transaction occurred. It would be unfair to judge them by the calcium light which has been turned on for six years, and which has enabled us to trace at last the sinuous path of Riddle and his confederates in crime, and the means by which this bank has been robbed and plundered. We are of opinion that the master and the court below were right in their conclusion, and the decree is affirmed upon the appeal of the assignee, and the appeal dismissed at his costs.

[Omitting opinion on other assignments of error.]

GIBBONS *v.* ANDERSON.

1897. 80 *Federal Reporter*, 345.

In U. S. Circuit Court, Western District of Michigan.

Severens, District Judge. The bill in this case was filed by the complainant, as receiver of the City National Bank of Greenville, to establish the liability of the defendants, Foster and Anderson, who were directors of the bank, for negligence in the performance of their duties as such, which it is alleged has resulted in a heavy loss to the bank and its creditors. The bank was organized April 28, 1884, with a capital stock of $50,000. It suspended on the 22d day of June, 1893. The complainant was appointed receiver thereof by the comptroller of the currency five days later, and on July 1, 1893, entered upon the discharge of his duties. The total liability of the bank to its creditors at the time of its failure was $237,733. The nominal value of its assets was about $326,000, but the total net amount which the receiver has been able to realize from the assets is only about $40,000. This result is certainly a very startling one, and the enormous loss in the liquidation of the bank's assets calls for an inquiry for its causes. And they are not far to seek. The defendants were members of the board of directors from its organization to the date of its suspension. Le Roy Moore was another director, and, either in the capacity of cashier or president, was its managing officer during the whole of the bank's operations. If during part of the time another person was cashier, he was only nominally such. Moore dominated the bank, and exercised the functions of cashier. Upon investigation it turns out that substantially from the beginning Moore employed the bank for the promotion of his own business enterprises, and, to a steadily increasing amount, has in one way and another diverted its funds to his own use, to the extent that at the date of the suspension of the bank he was indebted to the bank upon paper of which he was the maker in the sum of $36,263.63, and as indorser in his own name in the sum of $44,819.59. He was also liable as indorser under the name of Le Roy Moore & Co. in the sum of $17,419.97. No other person than Le Roy Moore was liable for these

indorsements of Le Roy Moore & Co.; the other member having long since been discharged by the renewal of paper and the extension of credit without his knowledge, — that firm having been dissolved in 1887, and the liabilities thereof assumed by Moore. There was also in the bank at the time of its suspension, representing part of its assets, paper upon which the Stanwood Manufacturing Company was maker to the amount of $8,750, and upon which it was indorser, $67,748.54, amounting in all to $76,498.54. This Stanwood Manufacturing Company was a business concern of which Moore was the owner, with a trifling exception. He owned 2,400 of the 2,500 shares of $10 each, and, so far as appears, only 20 other shares were taken. The books of the company show that $15,000 only of its capital stock were paid in, and this by Le Roy Moore's individual promissory notes, upon which he never made any payment. The bank had a chattel mortgage on all its property, and the sum of $3,500 was the sum realized out of the sale of that property under this mortgage. Over $63,000 of paper held by the bank, upon which the Stanwood Manufacturing Company was indorser, consisted of accommodation notes made by the employés about the factory of the Stanwood Manufacturing Company, and was worthless. This paper was all unloaded upon the bank by Moore in the prosecution of his own enterprises, and operated practically as a credit to himself. For a number of years prior to the suspension of the bank he was a borrower from it, either upon his own name, or under a guise so thin as to be transparent, to an amount grossly in excess of the legal limit. The comptroller in his letter of October 14, 1892, states that at the last examination he was directly indebted to the bank in the sum of $29,565. In all these ways, direct and indirect, Moore converted the assets of the bank to his own use, and in the end it appears that for all these large sums which Moore had obtained, and which were represented by paper which he had employed for that purpose, amounting to $172,768.88, only a very little can be realized. Moore made a trust deed of all his property to secure the debts he owed to the bank, out of which not more than $12,000 to $15,000 can be realized. This is the result, not of a single fraud, nor of a group of contemporaneous frauds, practiced by Moore, but, as already stated, it is the consequence of malversation of the funds of the bank from about the beginning of its history. It is needless to go into detail. The books of the bank show that he was going deeper and deeper into the funds of the bank, and, under one cover or another, converted of its assets more than three times the amount of its capital stock. The defendants, who were directors all this time, say that they were ignorant of anything wrong in the affairs of the bank until their eyes were opened to the facts by its failure. Greenville is a small place, of only about 3,000 inhabitants, and the defendants resided there. The volume of the business of the bank was comparatively small, — certainly not so large but that the most cursory examination of the general features of its business by

any one having ordinary business intelligence would have disclosed the truth. It is contended by the directors that they did not in fact know how Moore was carrying the substance out of it, and it is the more charitable view to take of their conduct to the extent that supine negligence is more easily excused than active fraud. There is in the record the testimony of witnesses stating that at the time of the failure of the bank these defendants declared that they trusted all to the president, and that they knew but little of the bank's affairs, relying as they did upon their confidence in the management. But what else can be said than that, if they had notice of the facts, they were culpable, or that, if they did not know them, they were grossly negligent and inattentive to their duties? The testimony convinces me that the latter is the fact, and that their negligence and lack of interest was so profound that not even the disclosures and the warning contained in the letter of the comptroller of October 14, 1892, and which, pursuant to his request, was brought to their attention, aroused them from the stupor which beset them; for the situation was in no wise redeemed, and grew steadily worse without the moving of a hand by the directors to save it. From the time of their election the board of directors seems to have slumbered over the affairs of the bank while its managing officer was plundering it of all that it owned, and much that belonged to others. Once in a while there seems to have been some faint consciousness, but nothing which indicates any activity. But they say, and have called witnesses to prove, that acting in accord with the usage and custom of national banks, and having called into the management a person in whom they had entire confidence, which was justified by his reputation, and committed the affairs of the bank to him, they were not bound to have doubt and distrust of his correct dealing until something occurred which should arouse suspicion. And this is their defense. The learned counsel for the defendants puts the question thus:

"Whether a director in a national bank is individually liable for loss to the bank accruing through another director, viz. its president, when such mismanagement was not known to or participated in by the directors sought to be charged."

Or, in another form:

"Whether an individual director in a national bank is liable in his individual capacity for all losses occasioned by the mismanagement of the bank's affairs by a trusted officer through the neglect of the board of directors to meet and examine into the affairs of the bank."

These questions present in the most favorable light for the defendants what is undoubtedly the substance of the inquiry upon the facts which existed in this case, and which is, in short, this: Whether the duty of the board of directors is discharged by the selection of officers of good reputation for ability and integrity, and then leaving the affairs of the bank without any other supervision or examination than mere inquiry of the officer, and relying upon his statements until some

cause for suspicion attracts their attention. Section 9 of the national banking act, being section 5147 of the Revised Statutes, provides that:

"Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association."

And by section 5145 it is declared that the affairs of such association shall be managed by not less than five directors. The oath which the director is required to take, that he will diligently and honestly administer the affairs of such association, indicates the scope of his obligation. The management of the bank is cast upon the board of directors. The duty of managing and administering the affairs of the bank by the board of directors has been differently construed in decisions bearing upon this subject, but it is not necessary for me to analyze the cases, or to reconcile their apparent differences. Some of them have gone to a length which in my opinion is extremely dangerous to the public safety, and, if generally applied, would make these banking associations, which were designed to supply the people of the country with financial institutions hedged about with security on which their confidence might securely rest, the objects of doubt and distrust. The rule of decision by which my judgment in the present case must be guided is laid down in the case of *Briggs* v. *Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924. Much of the discussion in that case was devoted to the consideration of the special circumstances upon which rested the charges made against the several directors. Those circumstances have little or no resemblance to those of the present case, and not much aid is afforded by that part of the discussion; for, as the court in that case observed, each case must stand upon its own facts. The directors in that case were held to be excusable. One very important and noticeable difference between that case and this is in the fact that the question there was narrowed down to one of fact, as to whether the defendants were fairly liable for not preventing loss by putting the bank into liquidation within 90 days after they became directors, the previous condition of the bank being admitted to have been good, whereas in the present case the defendants' neglect runs through quite a number of years. But the court laid down certain general rules by which the obligation of directors of national banks is to be tested; that is to say, they declare what is the minimum of that obligation. Chief Justice Fuller, delivering the opinion of the court, said: —

"We hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figureheads. They are entitled, under the law, to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision; nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention."

In my opinion, it does not meet the requirements of this statement of the law that directors may confide the management of the operations of the bank to a trusted officer, and then repose upon their confidence in his right conduct, without making examinations themselves, or relying upon his answers to general questions put to him with regard to the status of the affairs of the bank. To begin with, it is to be assumed in every case that the directors have not selected any other than a man of good reputation for capacity and integrity. Any other idea assumes that they have been guilty at the outset of a glaring fault. Further, it is a well-known fact that a large proportion of the disasters which befall banking institutions come from the malfeasance of just such men, and it would be manifest to everybody that only a satisfactory and quieting reply would be made by the official who has any reason for concealment. Again, what are the duties of management that are committed to the cashier, or the officer standing in his place? They are those which relate to the details of the business, to the conduct of particular transactions. Even in respect of those, his duties are conjoint with those of the board of directors. In large affairs it is his duty to confer with the board. In questions of doubt and difficulty, and where there is time for consultation, it is his duty to seek their advice and direction. It is his duty to look after the details of the office business, and generally to conduct its ordinary operations. It is the right and duty of the board to maintain a supervision of the affairs of the bank; to have a general knowledge of the manner in which its business is conducted, and of the character of that business; and to have at least such a degree of intimacy with its affairs as to know to whom, and upon what security, its large lines of credit are given; and generally to know of, and give direction with regard to, the important and general affairs of the bank, of which the cashier executes the details. They are not expected to watch the routine of every day's business, or observe the particular state of the accounts, unless there is special reason; nor are they to be held responsible for any sudden and unforeseen dereliction of executive officers, or other accidents which there was no reason to apprehend. The duties of the board and of the cashier are correlative. One side are those of an executive nature, which relate mainly to the details. On the other are those of an administrative character, which relate to direction and supervision; and supervision is as necessarily incumbent upon the board as direction, unless the affairs of banks are to be left entirely to the trustworthiness of cashiers. Doubtless there are many matters which stand on middle ground, and where it may be difficult to fix the responsibility, but I think there is no such difficulty here. The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that account will give reputation to the bank, and that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused,

which generally does not happen until the mischief is done, cannot be accepted as sound. It is sometimes suggested, in effect, that, if larger responsibilities are devolved upon directors, few men would be willing to risk their character and means by taking such an office; but congress had some substantial purpose when, in addition to the provision for executive officers, it further provided for a board of directors to manage the bank and administer its affairs. The stockholders might elect a cashier, and a president as well. The banks themselves are prone to state, and hold out to the public, who compose their boards of directors. The idea is not to be tolerated that they serve as merely gilded ornaments of the institution, to enhance its attractiveness, or that their reputations should be used as a lure to customers. What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence of depositors or other creditors if it were given out that these directors whose names so often stand at the head of its business cards and advertisements, and who are always used as makeweights in its solicitations for business, would only select a cashier, and surrender the management to him? It is safe to say such an institution would be shunned and could not endure. It is inconsistent with the purpose and policy of the banking act that its vital interests should be committed to one man, without oversight and control.

Recurring to the present case, it is clear that unless the board of directors is to be absolved upon the theory that they were justified in committing the affairs of the bank to Moore, and relying upon his good conduct, and his answers to the perfunctory questions which were occasionally put to him, until they were brought to the facts by the collapse of the bank upon the first prick of a financial stringency such as came upon the country in the summer of 1893, they must be held liable. It is with sincere commiseration and regret that the court feels compelled to reach this conclusion, in view of the consequence which must follow to these directors. But there is another side to this matter. The court cannot ignore the rights and interests of the depositors and others who have trustfully confided their money to the bank, and who now find that it was run through a shell into the hands of Moore, while the defendants turned their heads away, and failed to give them the protection which a proper discharge of their duties would have afforded. The records of the board of directors make a sorry showing, when put in contrast with the financial history of the bank. The entries are few, at long intervals, and are almost wholly limited to the election of directors and the declaration of dividends. They are feebly supplemented by the oral testimony of the

defendants, which tends only to show that individual inquiries were occasionally made by them, of a comparatively superficial character. There was no examination of the books; at least, none of any value. If there had been such examination by a fairly intelligent man, such as a director promises he is, the condition of things would have been seen. It is not irreconcilable with what they declared, when the bank failed, with respect to their knowledge of its affairs, and with what I must believe was substantially the truth of the matter. It may be conceded that the members of the board were not responsible for the malfeasance or nonfeasance of their associates, where the fault of the others was not known to them, and they were helpless to prevent the consequences; but in the present case the charge of negligence rests upon the whole board, and there is nothing to show that the defendants took any steps to retrieve the consequences of the joint negligence. If the defendants had been able to show that they themselves had done what they could to induce the board to attend to its duty, a different case would be presented. I do not understand why the comptroller did not more energetically interfere, but I have no duty to criticise his action.

[The learned Judge then *held*, that the date from which the directors should be charged with losses was July 1, 1892; when the fact that a year had elapsed without the declaration of a dividend should have induced the directors to institute an examination.]

Decree to be entered in conformity with the above opinion.

DOVEY *v.* CORY.

House of Lords, Aug. 1, 1901. 17 *Times Law Reports*, 732.[1]

THIS was an appeal from the decision of the Court of Appeal (the Master of the Rolls, now Lord LINDLEY, Sir F. H. JEUNE, and Lord Justice ROMER), which reversed a judgment of Mr. Justice WRIGHT. The hearing before the Court of Appeal (*sub nomine* "*In re* National Bank of Wales") is reported in 15 *The Times* L. R. 517; L. R. (1899) 2 Chan. 629; and 68 *L. J.* Chan. 634.

The appellant is the liquidator of the National Bank of Wales, and the Metropolitan Bank (of England and Wales) have purchased and taken over its assets and liabilities. The respondent, John Cory, was for some years a director of the National Bank. In the liquidation of the latter a summons was taken out to render the respondent liable — not to creditors, all of whose claims had been satisfied — but to the contributories, in respect to alleged misfeasance (1) in paying dividends out of capital; (2) in making improper advances to directors;

[1] Portions of the opinions are omitted. The case will be officially reported in Law Reports (1901), Appeal Cases. — ED.

and (3) in making improper advances to customers who were, or were reputed to be, insolvent, and the summons asked that the respondent should be ordered to repay the full amount of all losses caused by such acts of alleged misfeasance with interest and costs. Mr. Cory became a director on November 23, 1883, and resigned on December 18, 1890. The summons asked that the respondent should be deprived of the benefit of the Trustee Act, 1888, and of the Statutes of Limitation, on the ground that the losses arose from the respondent's wrongful acts and fraudulent concealment of the true state of affairs. The appellant's counsel, however, disclaimed the imputation of any moral obliquity on the part of the respondent, but argued the question on the basis of negligence and failure to discharge the duties of a fiduciary position. The transactions complained of were voluminous and ranged over a series of years and related to the affairs not only of the head office, but of the branches, which in 1890 were 33. It was, however, found possible by the parties to condense the story within the limits of four volumes and about 1500 pages. In February, 1893, an agreement was entered into between the National Bank of Wales and the Metropolitan, Birmingham, and South Wales Bank, now the Metropolitan Bank (of England and Wales) (Limited) whereby the latter bought the assets and goodwill and undertook the liabilities and contracts of the former, the value of the assets and goodwill being taken at not less than £110,000. Voluntary resolutions were passed for winding up the National Bank, and Thomas Cory, its former chairman, and the appellant were appointed liquidators. Mr. Thomas Cory subsequently resigned and the appellant became sole liquidator. The alleged amount of improper payments of dividends was £52,986; of loss on advances and credits to directors to December 31, 1890, £37,731, and of loss on improper advances to customers, £43,087. The whole of the assets were realized or valued, and the appellant Dovey alleged that after discharging the liabilities of the National Bank and crediting it with the value of its assets and £110,000 as its goodwill, there remained a deficiency of assets amounting to £84,392. Calls were made of £2 10*s.* per share each in July, 1896, and September, 1899. Mr. Justice Wright ordered the respondent to pay £54,787, being £37,000, the aggregate amount of dividends paid to the shareholders in 1887, 1888, 1889, and 1890 (except a part of the last dividend), and as to the balance, interest at 5 per cent. on each of the dividends. The learned Judge held that all these dividends were in fact paid out of capital; but he declined to make the respondent liable for improper advances to directors or customers. The Court of Appeal, in an elaborate judgment delivered by the Master of the Rolls, exonerated the respondent from liability. This decision was affirmed by the noble and learned Lords.

Sir *R. T. Reid*, K. C., *Ingpen*, K. C., and *S. T. Evans*, for appellant.

Swinfen Eady, K. C., *Rufus Isaacs*, K. C., *G. F. Hart* and *E. A. Nepean*, for respondent.

Sheldon, for Metropolitan Bank of England and Wales, which was originally a respondent, but subsequently made an appellant.

The LORD CHANCELLOR, [LORD HALSBURY].—In this case the liquidator of the National Bank of Wales (Limited) appeals against a judgment of the Court of Appeal, whereby Mr. John Cory, the respondent, was discharged from the liability which Mr. Justice Wright's judgment had imposed upon him to pay £37,000 for the benefit of the shareholders of the company, in respect of dividends already distributed, and a further sum for interest. Mr. John Cory was a director of the company, and it is for his supposed misconduct in the management of the affairs of the company that this liability was imposed upon him. It is alleged and proved that certain losses have been sustained by the company, and the ground upon which Mr. John Cory is sought to be made liable is the very short and intelligible ground that he was a party to false and fraudulent statements as to the position of the company and had had a share in causing these losses. The Court of Appeal have acquitted him of any knowledge of what was falsely stated, and Sir Robert Reid, in opening this appeal, stated to your Lordships that he did not intend, in arguing for Mr. John Cory's liability, to impute to him any moral obliquity. Now there is no doubt that there were balance-sheets laid before meetings of the shareholders which, to use the language of the articles of the association, were not proper and which did not truly report as to the state and condition of the company, and did not comply with the requirements of the articles in question in respect of the particular sum which the directors recommended as dividend, that it should be paid out of the profits, but a greater sum was paid out as dividend than would have been paid if certain things had been taken into consideration, and therefore larger than should have been paid. A great part of the judgment, both of Mr. Justice Wright and of the Court of Appeal, is occupied by discussing matters which are not now before your Lordships as matters in debate. It is now admitted that Mr. John Cory ceased to be a director in December, 1890. My Lords, I am clearly of the opinion that the judgment of the Court of Appeal is right and ought to be affirmed; but my opinion is entirely based upon the question of fact that he was guilty of no breach of duty whatever, and for reasons which I will refer to hereafter I am very anxious not to deal with some reasons given for their judgment by the Court of Appeal, which, in view of the facts that I take, do not arise here; and in what I say I desire to be understood as only dealing with the facts of this particular case. Now, in the first instance, I will assume that the company has sustained loss by the issue of fraudulent balance-sheets, by the improper advance of money to the customers of the bank, and that it has also sustained loss by the lending of money to directors without security. With respect to the default involving liability, if Mr. John Cory was conscious of the falsehood it is not necessary to go any further. Like

any one else who is a party to a false statement acted upon to the prejudice of the person to whom it is made, he would be liable to the extent to which his falsehood has inflicted loss on his victims, but after the admission that has been made it is unnecessary to pursue this head of inquiry; he certainly could not be acquitted of moral obliquity if party to a fraudulent statement; but it is said he has so grossly neglected his duty as a director that, though he may not have known the true state of the facts, he ought to have known them, and his breach of duty in that respect renders him liable. In order to see how far this obligation is made out it is necessary to consider what the business of the company was, and what was the position of Mr. John Cory in relation to it. My Lords, I think it is idle to talk in general terms of the duty of a director to look after the concerns of the company of which he is one of the managers without seeing what in the ordinary course of business he ought to do or to have done. Now there are some things which, of course, must be, or at all events ought to be, apparent to any one responsible for the conduct of a commercial business, and we must apply that observation to the business of which we are speaking — namely, a banking business; but I do not understand that any one has suggested that there was neglect or default by reason of the absence of some system under which, if honestly carried out, the interests of the bank would have been in that respect secured. It is admitted that (extract from judgment of the Court of Appeal) the company's principal bank and its head office were at Cardiff, where the directors met and the general manager was in daily attendance. The company had also many branch banks each with its own manager. The course of business was this. Each branch manager sent weekly to the head office what is called a weekly state — i. e., an account showing how the assets and liabilities of the branch stood, what advances or overdrafts had been made or allowed and to whom, what securities the bank held, and other matters. Every quarter each branch manager made a more formal return to the head office showing the position of the branch and the business done during the past quarter. It was the duty of the general manager to examine these documents and to report to the board anything disclosed by them which required their attention. The weekly states or quarterly returns were in the board rooms for reference in case of need, but unless attention was called to them the directors did not think it necessary to examine them. The chairman of the directors was Mr. Thomas Cory, a brother of Mr. John Cory. The chairman and general manager (Mr. Collins) visited each branch bank every year; and, in addition, two skilled inspectors frequently went round and inspected the accounts and reported to the general manager. The accounts of the branch bank, appear, however, not to have been separately audited by professional accountants. The auditors employed to examine the company's accounts and to certify the annual balance-sheets and accounts laid before the shareholders only

saw the head office books and the returns from the branch offices certified by their respective managers to the head office. These certified returns formed part of the weekly states, but omitted much that they contained. The minutes of the directors' meetings show that, speaking generally, they attended with reasonable regularity and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the board either by the chairman or by the general manager. Mr. John Cory stated in his affidavit the general course of business at board meetings, and his cross-examination does not substantially differ from the account he there gives. But it is suggested that Mr. Cory is responsible because this and other portions of the system were not faithfully adhered to. And, indeed, what is really made the test of his responsibility is that he did not find out what was fraudulently withheld from his knowledge. So the warning letters of the auditor, which were never suffered to reach him, are suggested as warnings to him which he ought not to have neglected. Again, there was the insufficient striking out of bad and doubtful debts, by which it is alleged that the amounts paid in dividends to himself and other directors, as well as shareholders, are by a process of reasoning and calculation assumed to be payments out of capital. These things are all assumed to have been done as though done with knowledge and intention, while at the same time the admission is made that there was no evil mind or conscious fraud. Now I think such things, if done with evil mind and intention, would be fraud, and it comes back again to the proposition that the responsibility must be based upon the assumption that Mr. Cory is responsible because he did not find out the fraudulent knaves by whom he was surrounded. One was his own brother, another was the general manager, and, once I arrive at the conclusion that there were those about him whose interest and object it was to deceive him, I certainly do not think that the things which were designedly concealed from him are things which ought to be relied upon as matters for which he was responsible. In the view I take the whole of the evidence — which is relevant and important to the question, did Mr. Cory knowingly permit the things to be done which were done — becomes to my mind entirely immaterial if one is to start with the assumption that he knew nothing about them. Dealing with the several heads of charge as they have been formulated in the judgment of Mr. Justice Wright — viz., negligence, breaches of trust in respect of advances made contrary to said articles of association, and payment of dividends out of capital. I think each and all of them may be disposed of by the proposition that Mr. Cory was not himself conscious of any one of these things being done, and that unless he can be made responsible for not knowing these things, as Mr. Justice Wright put it, unless he is shown to have exhibited a complete neglect of the duties he had undertaken, the charges are not made out. The charge of neglect appears to rest on the assertion that Mr. Cory, like the other

directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors — how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious that if there is such a duty it must render anything like an intelligent devolution of labor impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairman were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for debts and that he believed such assurances is involved in the admission that he was guilty of no moral fraud; so that it comes to this — that he ought to have discovered a network of conspiracy and fraud by which he was surrounded and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors themselves. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers — and the theory of his being free from all fraud assumes under the circumstances that he was — there appears to me to be no case against him at all. The provisions made for bad debts, it is well said, was inadequate, but those who assured him that it was adequate were the very persons who were to attend to that part of the business — and so of the rest. If the state and condition of the bank were what were represented, then no one will say that the sum paid in dividends was excessive. If I assume, as I do, that Mr. Cory acted upon representations made to him which he believed and which came from the officers of the bank to whom he was, in my judgment, justified in giving credit, the discussion of whether the dividends actually paid were or were not properly divisible, has no bearing on Mr. Cory's liability, and I am very reluctant to give any opinion upon it, inasmuch as the question may arise when it may be necessary to decide it. I deprecate my premature judgment. My Lords, I am, as I have said, very reluctant to enter into a question which for the reasons I have given does not arise here, and into which the Court of Appeal has entered at some length. The only reason why I refer to it at all is lest by silence I should be supposed to adopt a course of reasoning as to which I am not satisfied that it is correct. I doubt very much whether such questions can ever be treated in the abstract at all.

The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining the question what may be treated as profits and what as capital. Even the distinction between fixed and floating capital which in an abstract treatise like Adam Smith's "Wealth of Nations" is appropriate enough, may with reference to a concrete case be quite inappropriate. It is easy to lay down as an abstract proposition that you must not pay dividends out of capital, but the application of that very plain proposition may raise questions of the utmost difficulty in their solution. I desire, as I have said, not to express any opinion, but as an illustration of what difficulties may arise the example given by the learned counsel of one ship being lost out of a considerable number, and the question whether all dividends must be stopped until the value of that lost ship is made good out of the further earnings of the company or partnerships, is one which one would have to deal with. On the one hand, people put their money into a trading concern to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve its ruin. On the other hand, companies cannot at their will and without the precaution enforced by the statute reduce their capital; but what are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve. When the time comes that these questions come before us in a concrete case we must deal with them, but until they do I, for one, decline to express any opinion not called for by the particular facts before us, and I am the more adverse to doing so because I foresee that many matters will have to be considered by men of business which are not altogether familiar to a Court of law. I move that this judgment be affirmed and this appeal dismissed with costs.

[LORD MACNAGHTEN delivered a short concurring opinion.]

LORD DAVEY. . . . The respondent, in his affidavit, states generally that he was from first to last under the honest and genuine belief that the affairs of the company were in a sound and solvent condition, and that its business was being carried on at a profit, and that its net profits for the time being were amply sufficient to justify the dividends which were from time to time during his directorship paid to the shareholders. And he adds that the general manager and branch managers were, so far as he knew, men of unquestioned confidence and integrity, and that he and his co-directors were compelled by the magnitude of the business and the exigencies of the case generally to rely upon (and he did rely upon) these officials in all ordinary matters relating to the accounts of customers and other questions of detail. And he deals specifically with the various matters alleged in the liquidator's evidence on the same lines. The respondent was cross-examined on his affidavit at great, but not unnecessary, length. I am not, I think, doing injustice to the appellant's case when I say that reliance was chiefly placed on the "weekly states" and "quarterly returns" made

by the branch managers, or that, if he cannot succeed in fixing the respondent with liability on these documents, his case fails. These returns were laid on the table in the board room at each meeting of the directors. A comparative analysis of them, made by the skilled accountant who advises the appellant, does, I think, show that certain accounts which were treated as good by the general manager in the preparation of the balance-sheets submitted by him to the directors were, in fact, irretrievably bad, and it is difficult to acquit the general manager of improper conduct in including them as assets. The respondent says in his affidavit that the "weekly states" consisted each week of a very large and voluminous pile of sheets, which it would have taken the directors a couple of days to go through, and that it was the duty of the general manager to go through the weekly states, with the letters of the branch managers accompanying them, and to place upon the agenda any points arising upon them which he considered ought to be brought to the attention of the directors; and upon the discussion of such points the documents were, when necessary, referred to; but, except in such cases, the weekly states were not consulted by the directors, but they relied on the general manager going carefully through them and drawing their attention to any matter requiring their consideration. On cross-examination he adhered to this statement. He added that the chairman also went through them often individually, and he did so for the board. He admitted that before recommending a dividend he did not look at all the accounts or look at the books themselves, but he said that the directors looked at the documents which were put before them by the manager — the amount which he considered was doubtful and bad — and they made a reserve for it. He also said that it was never brought before him that amounts due from bankrupt debtors were included in the balance-sheets of each year, and he never heard of any single case of that kind. It further appeared from the evidence of other witnesses that the branches of the bank were regularly visited and their books examined by the chairman and two inspectors. In this state of the evidence, I ask whether the course of business at the board meetings as described by the respondent was a reasonable course to be pursued by the respondent and other directors, or whether the knowledge that might have been derived from a careful and comparative examination of the weekly states and quarterly returns from the different branches of the bank ought to be imputed to the respondent, or alternatively, whether he was guilty of such neglect of his duty as a director as would render him liable to damages? I do not think that it is made out that either of the two latter questions should be answered in the affirmative. I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and gen-

eral manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in "*Hallmark's Case*" (9 Ch. D., 329), and by Mr. Justice Chitty in "*In re Denham & Co.*" (25 Ch. D., 752), that directors are not bound to examine entries in the company's book. It was the duty of the general manager and, possibly, the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration, but the respondent was not, in my opinion, guilty in negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. The case is no doubt one of some difficulty, but the appellant has not made out to my satisfaction that the respondent wilfully (as that term is explained in the cases I have referred to) misappropriated the company's funds in payment of dividends.

. . . . . .

[Lord Brampton concurred.]

Judgment affirmed. Appeal dismissed.

SECTION III.

Special Interest of Director. — How affecting Action taken by Board. Dealings between Director and Corporation.[1]

ABERDEEN RAILWAY CO. *v.* BLAIKIE.

1854. 1 *Macqueen*, 461.[2]

In the House of Lords, on appeal from the Scotch Court of Session.

The action was by Messrs. Blaikie, iron-founders in Aberdeen, against the Railway Company for performance of a contract whereby the Company had agreed to purchase and accept from Messrs. Blaikie certain iron chains, which they were to manufacture for the Company at the rate of 8*l.* 10*s.* per ton. The summons concluded for implement of the contract or for damages.

The principal defence was, that Mr. Thomas Blaikie, the managing partner of the Pursuers, was at the time of the contract a Director, and indeed Chairman, of the Railway Company, and so incapacitated for dealing in the character with his own firm.

The Court of Sessions held that the Companies' Clauses Consolidated Act (8 Vict. c. 17, s. 88 & 89,) did not nullify the contract, although under it the contractor ceased to be a Director. They therefore decide in favor of the Pursuers. Hence this appeal.

[1] See also, *post*, chapter on Power of an insolvent Corporation to prefer particular Creditors. — Ed.

[2] Arguments and part of opinions omitted. — Ed.

The *Solicitor General* (Sir *R. Bethell*) and Mr. *Gordon*, for appellants.

Mr. *Rolt*, and Mr. *Macfarlane*, for respondents.

The LORD CHANCELLOR (LORD CRANWORTH). . . . This, therefore, brings us to the general question, whether a Director of a Railway Company is or is not precluded from dealing on behalf of the Company with himself, or with a firm in which he is a partner.

The Directors are a body to whom is delegated the duty of managing the general affairs of the Company.

A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. (See Mr. Hudson's Case, 16 Beav. 485.) And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the cestui que trust, which it was possible to obtain.

It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person, — they may even at the time have been better.

But still so inflexible is the rule that no enquiry on that subject is permitted. The English authorities on this head are numerous and uniform.

The principle was acted on by Lord King in *Keech* v. *Sandford*, Select Cases, temp. King, p. 61, and by Lord Hardwick in *Whelpdale* v. *Cookson*, 1 Ves. Sen. 8, and the whole subject was considered by Lord Eldon on a great variety of occasions. It is sufficient to refer to what fell from that very learned and able judge in *Ex parte James*.

It is true that the questions have generally arisen on agreements for purchases or leases of land, and not, as here, on a contract of a mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject matter of the agreement, but on the fiduciary character of the contracting party, and I can not entertain a doubt of its being applicable to a party who is acting as manager of a mercantile or trading business for the benefit of others, no less than to that of an agent or trustee employed in selling or letting land.

Was then Mr. Blaikie so acting in the case now before us? — if he

was, did he while so acting, contract on behalf of those for whom he was acting with himself?

Both these questions must obviously be answered in the affirmative. Mr. Blaikie was not only a Director, but (if that was necessary) the Chairman of the Directors. In that character it was his bounden duty to make the best bargains he could for the benefit of the Company.

While he filled that character, namely, on the 6th of February, 1846, he entered into a contract on behalf of the Company with his own firm, for the purchase of a large quantity of iron chairs at a certain stipulated price. His duty to the Company imposed on him the obligation of obtaining these chairs at the lowest possible price.

His personal interest would lead him in an entirely opposite direction, would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed, and I here see nothing whatever to prevent its application.

I observe that Lord Fullerton seemed to doubt whether the rule would apply where the party whose act or contract was called in question is only one of a body of Directors, not a sole trustee or manager.

But, with all deference, this appears to me to make no difference. It was Mr. Blaikie's duty to give to his co-Directors, and through them to the Company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He was bound to assist them in getting the articles contracted for at the cheapest possible rate. As far as related to the advice he should give them, he put his interest in conflict with his duty, and whether he was the sole Director or only one of many, can make no difference in principle.

The same observation applies to the fact that he was not the sole person contracting with the Company; he was one of the firm of Blaikie, Brothers, with whom the contract was made, and so interested in driving as hard a bargain with the Company as he could induce them to make.

It cannot be contended that the rule to which I have referred is one confined to the English law, and that it does not apply to Scotland.

It so happens that one of the leading authorities on the subject is a decision of this House on an appeal from Scotland. I refer to the case of *The York Buildings Company* v. *Mackenzie*, decided by your Lordships in 1795.

. . . . . .

The principle, it may be added, is found in, if not adopted from, the civil law. In the Digest is the following passage: "Tutor rem pupilli emere non potest: idemque porrigendum est ad similia; id est ad curatores, procuratores, et quinegotia aliena gerunt." (Dig., Lib. xviii., t. 1, c. 34, s. 7.)

In truth, the doctrine rests on such obvious principles of good sense that it is difficult to suppose there can be any system of law in which it would not be found.

. . . . . .

It was further contended that whatever may be the general principle applicable to questions of this nature the Legislature has in cases of corporate bodies like this Company modified the rule.

The statute, i. e. the Companies' Clauses Act, it was argued, has impliedly, if not expressly recognized the validity of the contract, by enacting that its effect shall be to remove the Director from his office; indicating thereby that a binding obligation would have been created, which would render the longer tenure of the office of Director inexpedient; and your Lordships were referred to the case of *Foster* v. *The Oxford, Worcester, and Wolverhampton Railway Company.* That was an action for breach of a contract under seal, whereby the defendants covenanted with the plaintiffs (as in the case now before your Lordships) to purchase from them a quantity of iron. The defendants pleaded that, at the time of the contract one of the plaintiffs was a Director of their Company, and to this plea there was a general demurrer.

That such a contract would in this country be good at common law is certain. The rule which we have been discussing is a mere *equitable* rule, and therefore all the Court of Common Pleas had to consider was how far the contract was affected by the statute. The decision was that the statute left the contract untouched, and that its operation was only to remove the Director from his office. The 85th and 86th sections of the English statute 8th and 9th Vict., c. 16, on which the Court proceeded, are in the same words as the 88th and 89th sections of the Scotch statute, and the Counsel of your Lordships' bar relied on this decision as being strictly applicable to the case now under appeal. But there is a clear distinction between them. In Scotland there is no technical division of law and equity. The whole question, equitable as well as legal, was before the Court of Session. All that the Court of Common Pleas decided was that a contract clearly good at law was not made void by an enactment that its effect should be to deprive one of the contracting parties of an office. This decision will not help the Respondents unless they can go further and show that the statute has had the effect of making valid a contract which is bad on general principles, that is to say, principles enforceable here only in equity, but not recognized in our Courts of common law.

I can discover no ground whatever for attributing to the statute any such effect.

Its provisions, however, will still be applicable to the case of Directors who become interested in contracts, as representatives or otherwise, and not by virtue of contracts made by themselves.

I have therefore satisfied myself that the Court of Session came to a wrong conclusion.

I therefore move your Lordships that this Interlocutor be reversed.

[LORD BROUGHAM delivered a concurring opinion.]

Interlocutor reversed.

(2) *Officers.*

CHAPTER VIII.

POWER OF A PARTNER TO ACT IN BEHALF OF THE PARTNERSHIP.

SECTION I.

Sealed Instruments.

HARRISON v. JACKSON, SYKES, AND RUSHFORTH.

IN THE KING'S BENCH, MAY 12, 1797.

[*Reported in 7 Term Reports*, 207.]

THIS was an action of covenant upon an agreement of three parts stated in the declaration to have been made on the 10th of July, 1794, between the defendants, describing them as merchants and partners, of the first part, W. and J. Harrison of the second part, and the plaintiff of the third part, of one part of which said agreement, as being sealed with the seal of the said W. Sykes for himself and the other two defendants, the plaintiff made a *profert* in court. The declaration then stated the agreement and covenant of the defendants, the subject-matter of which agreement and covenant appeared on the agreement to be a partnership transaction on the part of the defendants, and to have been entered into on a full and valuable consideration received by them as partners. The declaration then stated the breach of covenant, whereby the plaintiff had sustained damage to the amount found by the jury.

To this declaration the defendants pleaded that the agreement was not the deed of the defendants. Issue being joined, the cause was tried at the sittings after Hilary Term, 1797, before Lord Kenyon at Guildhall, when the jury found a verdict for the plaintiff, damages £477 13*s*. 9*d*., and costs 40*s*., subject to the opinion of this court on the following case.

The defendants were partners. The agreement stated in the declaration was produced; and the subscribing witness proved that it was executed in his presence by the defendant Sykes in the following form: "For Jackson, Self, and Rushforth; W. Sykes." But neither Jackson

nor Rushforth was present at the execution. The question for the opinion of the court was, whether such execution of the agreement by the defendant Sykes were binding on the other defendants, Jackson and Rushforth.[1]

Dampier, for the plaintiff.[2]

Giles, for the defendants.

Lord Kenyon, C. J. I should be sorry to have it supposed that this case was reserved from the least particle of doubt that I had on the subject: the parties came to *nisi prius* with the facts admitted on both sides; for if the case had been opened there, I should certainly have given a decisive opinion against the plaintiff. The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest. But the power of binding each other by deed is now for the first time insisted on, except in the *nisi prius* case cited,[3] the facts of which are not sufficiently disclosed to enable me to judge of its propriety. Then it was said that if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed: but I deny that consequence just as positively as the former; for a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world: if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favorite creditor a real lien on the estates of the other partners.

Per Curiam, *Postea to the defendants.*[4]

[1] Sittings in Easter Term, 1785, at Guildhall, *cor.* Lord Mansfield, C. J.

[2] The arguments of counsel are omitted. — Ed.

[3] Mears *v.* Serocold, sittings in Easter Term, 1785, at Guildhall. The defendant pleaded *non est factum* to an action brought on a joint and several bond. At the trial it appeared that Jackson was in partnership with Serocold when the bond was given, and that the consideration of the bond was a partnership debt due from Jackson and Serocold to the plaintiff, and that Jackson first executed the bond for Serocold, and then for himself. Lord Mansfield ruled that for a partnership debt one partner had authority to execute a bond for another, and thereupon directed a verdict for the plaintiff. — Ed.

[4] Horsley *v.* Rush, 7 T. R. 209 (cited); Hall *v.* Bainbridge, 1 M. & G. 42; Piatt *v.* Oliver, 3 McL. 27; United States *v.* Astley, 3 Wash. C. C. 508; Layton *v.* Hastings, 2 Harringt. 147; Donaldson *v.* Kendall, 2 Ga. Dec. 227 (but see Straffin *v.* Newell, T. U. P. Charlton, 163); Posey *v.* Bullitt, 1 Blackf. 99; Montgomery *v.* Boone, 2 B. Mon. 244; Cummins *v.* Cassily, 5 B. Mon. 74; Williams *v.* Hodgson, 2 Har. & J. 474; Doe *v.* Tupper, 12 Miss. 261 (but see Shirley *v.* Fearne, 33 Miss. 653); Bentzen *v.* Zierlein, 4 Mo. 417 (but see Gwinn *v.* Rooker, 24 Mo. 291); Button

CHAPTER IX.

MODE OF CONTRACTING AND OF APPOINTING AGENTS.

HORNE *v.* IVY.

20 *Car.* 2. 1 *Modern*, 18.

TRESPASS for taking away a ship. The defendant justifies as servant under the patent whereby *The Canary Company* is incorporated, and whereby it is granted, "That none but such and such should trade thither, on pain of forfeiting their ships and goods, &c." and says, that the defendant did trade thither, &c. The defendant demurs.

POLLEXFEN *for the plaintiff* contended, that the defendant ought to have shewn the deed whereby he was authorized by the Company to seize the goods;[1] though he agreed, that for ordinary employments and services a corporation may appoint a servant without deed, as a cook, a butler, &c.[2] A corporation cannot license a stranger to fell trees without deed.[3] Nor can they make a disseisor without deed, nor deliver a letter of attorney without deed.[4] SECONDLY, The plea is double; for the defendant alledges two causes of a breach of their charter, *viz.* their taking in wines at *the Canaries*, and importing them here; which is double. Then there is a clause that gives the forfeiture of goods and imprisonment, which cannot be by patent.[5] This patent I take also to be contrary to some acts of parliament, *viz.* 2. *Edw.* 3. c. 1. 2. *Edw.* 3. c. 2. 2. *Rich.* 2. c. 1. 11. *Rich.* 2. c. 2; and these statutes the king cannot dispense withal by a *non obstante.*

TWISDEN, *Justice.* For the first point, I think, they cannot seize without deed, no more than they can enter for a condition broken without deed.

KELYNGE, *Chief Justice.* We desire to be satisfied, Whether this is *a monopoly* or not? — It was ordered to be argued again.[6]

[1] 26, Hen. 6. pl. 8. 14 Edw. 4. pl. 8. Bro. "Corporation" 59.

[2] Plowd. 95.

[3] 12. Hen. 4. pl. 17.

[4] 9. Edw. 4. pl. 59. Bro. "Corporation," 24. 34. 14. Hen. 7. pl. 1. 7. Hen. 7. pl. 9. 1. Roll. Abr.

[5] 8. Co. 125. Noy, 123.

[6] It appears in *Keble* and *Ventris*, that judgment was given in this case for the plaintiff, on the first objection, because the defendant justified by the command of *a corporation*, without shewing that his authority to seize the ship was by *a deed*; and S. C. *Siderfin* says, that the Court also held the bar bad in substance, because the king by his *patent* cannot create a *forfeiture* for the doing those things which his patent prohibits. See 3. Peer. Wms. 424. Hardres, 55. Skinner, 135, 224. 8. Co. 125. Palmer, 5. 3. Lev. 353. 1. Salk. 32. 5. Com. Dig. "Trade," (B.). 1. Burr. 526. 1. Term Rep. 118.

SHERMAN *v.* FITCH.

1867. 98 *Massachusetts*, 59.[1]

BILL IN EQUITY by assignees of the Northampton Street Sugar Refinery, an insolvent corporation, praying for a decree that a recorded mortgage of personal property, held forth by the respondent as having been made to him by the corporation, might be declared void. The mortgage (dated Jan. 19, 1865) purported, by the language of the grant, covenants, and condition, to be the mortgage of the corporation. It was signed "George R. Sampson, President of Northampton Street Sugar Refinery. [Seal.]"

After a demurrer had been overruled, the respondent filed an answer putting in issue the validity of the mortgage as a mortgage of the corporation. The case was reserved for determination by the full court on agreed facts, which were, in part, as follows: —

For some time prior to January 19, 1865, the respondent had been, and then was, selling agent of the corporation, which owed him about eighteen thousand dollars, to secure the payment of which by the corporation, George R. Sampson, who was president and a director, and was also manager of the manufacturing department, executed and delivered to him the instrument in question. At that date there were four directors (who were the principal stockholders): Sampson; his son; a nephew; and one Tappan, who was in Europe. That was the full number of the board required by the by-laws, which also provided that "the board of directors shall manage and control the business, property and affairs of the corporation." The records of the corporation contained no express vote of either directors or stockholders authorizing the execution and delivery to the respondent of a mortgage on the corporate property; but the execution and delivery of the instrument was known to all the directors except Tappan, at the time thereof, "and was approved by them, provided their neglect to make any objection to the same can be construed as an approval."

C. H. Drew, for complainants [argument omitted.]

D. P. Kimball, for respondent.

WELLS, J. [The court *held*, that the mortgage was, upon its face, the mortgage of the corporation, and not the individual contract of Sampson. The court then said:]

The remaining consideration relates to the authority of Sampson to execute the mortgage in behalf of the corporation. It is not necessary that the authority should be given by a formal vote. Such an act by the president and general manager of the business of the corporation, with the knowledge and concurrence of the directors, or with their subsequent and long continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of a corporation

[1] Only so much of the case is given as relates to a single point. — ED.

may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals. *Emmons* v. *Providence Hat Manufacturing Co.* 12 Mass. 237. *Milledge* v. *Boston Iron Co.* 5 Cush. 158. *Lester* v. *Webb*, 1 Allen, 34. The absence of one of the directors in Europe could not deprive the corporation of the capacity to act and bind itself by the acts of the officers in actual charge of its affairs.

. . . . . .

ROBERTS *v.* P. A. DEMING WOODWORKING CO.

1892. 111 *North Carolina*, 432.

THIS was a civil action, tried at the August Term, 1892, of *Buncombe* Superior Court, before *Bynum*, J., for the value of work and labor done for the defendant corporation.

The defendant denied the debt, and resisted payment upon the further ground that the contract was not in writing under seal of the corporation, nor signed by any authorized officer thereof, and therefore void under section 683 of *The Code*.[1] When the plaintiff rested his case, the Court intimated he could not recover on his own showing; the contract, being above $100, was not according to the formalities prescribed by *The Code*, s. 683. Whereupon the plaintiff submitted to a nonsuit and appealed.

H. B. Carter, for plaintiff.

T. H. Cobb, for defendant.

CLARK J. The court ruled that the plaintiff could not recover in any aspect of the evidence, because the contract of the defendant company was not "in writing and under the seal of the corporation, or signed by some officer of the company duly authorized," as required by *The Code*, s. 683. That section and its purport was construed in *Curtis* v. *Piedmont Company*, 109 Nor. Car. 401. It is there held that it applies to executory contracts and protects corporations from enforcement of such unless evidenced in the manner prescribed by the statute. But the Court adds that it does not apply to cases where the corporation has received and availed itself of property sold and actually delivered to it. In such cases, the company can be compelled to pay the fair value of such property. In the present case the claim is for work and labor done at a specified rate. The contract not being in writing and signed (or sealed), as required by the statute, the plaintiff cannot force the defendant to continue the contract as to the unexecuted part,

[1] "Every contract of every corporation, by which a liability may be incurred by the company exceeding one hundred dollars, shall be in writing, and either under the common seal of the corporation or signed by some officer of the company authorized thereto." — *Code*, s. 683. — ED.

but the plaintiff is entitled to recover a fair value for the labor already performed, and which the company has accepted, and of which it has enjoyed the benefit.

The defendant contends, however, that this action is brought upon the express contract, and that no recovery can be had upon a *quantum meruit*, and that if this is not so, still there was no evidence to justify a verdict for the value of the services. The complaint is sufficient to warrant a recovery, either upon express contract or for the value of the work and labor done. *Stokes* v. *Taylor*, 104 Nor. Car. 394, and cases there cited; *Fulps* v. *Mock*, 108 Nor. Car. 601. No amendment was necessary, but if desirable, the Court, in accordance with the present system of procedure, which, without undue neglect of form, favors a trial upon the merits, could and should have allowed an amendment of the complaint after a verdict in favor of the plaintiff, if successful. *The Code*, s. 273. As to the second objection raised, the contract price agreed upon between the authorized agent of the company and the plaintiff, while not conclusive (since the express contract was perforce abandoned), was certainly some evidence sufficient to go to the jury as to the value of the services.

The nonsuit must be set aside, and the case remanded for further proceedings in accordance with this opinion.[1]

PER CURIAM. *Error.*

FOSTER, J., IN ROYAL BANK OF LIVERPOOL *v.* GRAND JUNCTION R. & D. CO.

1868. 100 *Massachusetts, page* 445.

[In an action of contract on corporate bonds.]

FOSTER, J. A sealed instrument conclusively imports a consideration. And these bonds, having been duly executed and delivered, the holders could have maintained an action upon them, if their delivery had been merely gratuitous, and no value had ever been given for them.[2]

[1] For a more elaborate opinion reaching substantially the same result upon a somewhat similar statute, see *Puxley* v. *W. P. R. R.* 33 Calif. 183; and compare *Foulke* v. *R. Co.* 51 Calif. 365.

[2] But see 1 Morawetz on Corporations, 2d ed. s. 341. — ED.

MORRISON v. WILDER GAS CO.

1898. 91 *Maine*, 492.[1]

WISWELL, J. This action is to recover the purchase price of certain materials furnished by the plaintiffs for the construction of a gas plant at Rockland. The defendant denied that it had ordered the goods, or received them, or that it had any connection whatever with the construction of the gas plant.

For the purpose of showing that the defendant did construct this plant, and that it received and used these articles in the construction, the plaintiffs were allowed to introduce in evidence, against the defendant's objection, a written instrument which purported to be executed by the defendant corporation and which provided for the construction of the plant. The attestation clause and form of execution were as follows: — "In witness whereof, said Wilder Gas Company by the hands of its chairman of the executive committee, Luke A. Wilder, thereunto duly authorized, has hereunto set its corporate name and affixed its corporate seal, and said Knox Gas and Electric Company by the hand of A. D. Bird, its Treasurer, thereunto duly authorized, has set its corporate name and affixed its corporate seal the year and day above written.

The Wilder Gas Co., by Luke A. Wilder,
Chairman of Executive Committee (L. S.)
Knox Gas & Elec. Co., by A. D. Bird, Treas. (L. S.)"

Objection was made to the introduction of this instrument upon two grounds: because it was not a contract between the parties to the suit, and because there was no evidence showing that the contract had been authorized by the defendant corporation. We have no doubt that a contract between the defendant and the owner of the plant, if shown by competent testimony to have been authorized by the defendant, was admissible in evidence for the purpose for which it was introduced.

But was there any evidence showing that this instrument was the contract of the defendant? The signature of Luke A. Wilder, and the fact that at the time he was a member of the board of directors and of the executive committee of the defendant corporation, were proved and admitted; but there was no evidence by record or otherwise, outside of the instrument itself, and the fact that it bore the corporate seal, that the contract was ever authorized by the corporation, or that Wilder had authority to execute this contract or contracts of this general description, or that the executive committee or any member thereof had any authority to make contracts of this nature.

Some cases and text writers have laid down the rule that the presence of the corporate seal upon an instrument that purports to be the contract of a corporation gives rise to a prima facie presumption that it was affixed by proper authority; while others very materially limit

[1] Statement and arguments omitted. — ED.

the rule by saying, that when the seal is affixed by a proper official, in the line of his authority, it is evidence of the assent and act of the corporation.

Here the only proof was that Wilder was a director and member of the executive committee. But a director, as such, has no authority to make contracts for his corporation. He may of course have such authority, — it may be either express or implied, and it may be shown by record or parol, — but it does not follow that he had, merely from the fact of his being a director. It is a familiar rule, which requires no citation of authority, that directors of a corporation, as such, have no implied authority to act singly; they can only act as a board, unless there be an express or implied delegation of authority to act individually. So far as this case shows, Wilder had no such authority; he was not the proper official, either to sign the corporate name or to affix the corporate seal; it was not within the line of his authority.

We can see no reason why the presence of a corporate seal, which does not appear to have been affixed by one having authority, or by a proper official in the general line of his authority, should be even prima facie evidence that a contract, signed and sealed by a person, who, so far as the case shows, had no authority to make or execute this or such a contract, was the contract of the corporation.

We very much prefer the doctrine laid down by Mr. Morawetz in his work on Private Corporations. We quote from that work a portion of section 340: "It has sometimes been said, that, if the seal of a corporation appears to be affixed to an instrument, the presumption is that it was rightfully affixed, — that the seal is itself prima facie evidence that it was affixed by the proper authority. The meaning of these statements is not perfectly clear. The seal of a corporation certainly has no mysterious virtue not possessed by other seals; and a contract under seal executed by the agents of a corporation is subject to the same rules of evidence, and of law, as a similar contract executed by the agents of an individual. In order to prove the execution of a contract purporting to have been executed under the corporate seal, two facts must be shown. First, it must be shown that the agents by whom the contract purports to have been executed were in fact agents of the corporation, having authority to execute the contract in question, or contracts of that general description; and, secondly, it must be shown that the signatures are genuine, or, in other words, that these agents did actually execute that particular contract. The mere circumstance that a seal was affixed to the contract would evidently not tend to establish either one of these facts."

Here there was sufficient evidence that Wilder executed the contract in the name of the corporation and affixed thereto the corporate seal. There was no evidence whatever that he had any authority, express or implied, to execute this contract, or contracts of this nature, or any contract whatsoever for the defendant corporation. We think therefore, that the instrument was improperly admitted.

Exceptions sustained.